IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D.,
Appellants,

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis,
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

JURISDICTIONAL STATEMENT

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JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis,
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

JURISDICTIONAL STATEMENT

Appellants, PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D., bring this direct appeal from an "Order, Judgment and Decree" entered January 31, 1975, by a statutory three-judge panel of the United States District Court for the Eastern District, Eastern Division, of Missouri. The majority opinion was concurred in by the Honorable Roy W. Harper, United States Senior District Judge, and the Honor-

able H. Kenneth Wangelin, United States District Judge. An opinion, dissenting in main, was written and filed by the Honorable William H. Webster, United States Circuit Judge.

The "Order, Judgment and Decree" upheld and sustained, in main, the constitutionality of "House Committee Substitute for House Bill No. 1211," enacted and effective in the State of Missouri on June 14, 1974, which regulates in various fashions and manners the decision for and the medical procedure of abortion. Appellants' specific request for a permanent injunction against the application and enforcement of said challenged legislation, as contained within paragraphs 2 and 28 of their "Verified Complaint for Declaratory Judgment and Injunctive Relief," hereinbelow filed on June 17, 1974, and which had been sought as necessary in aid of jurisdiction, was denied as to those provisions upheld and sustained by the United States District Court.

Appellants respectfully submit this *Jurisdictional Statement* to demonstrate that this is a direct appeal over which this Honorable Court has jurisdiction and that this appeal presents crucial, important and substantial federal questions meriting plenary review.

CITATION TO OPINION BELOW

The January 31, 1975 "Memorandum Opinion" and "Order, Judgment and Decree" by the statutory three-judge panel of the United States District Court for the Eastern District of Missouri, Eastern Division, in cause number 74-416C(A) are not yet reported. The texts of the same are set out, *infra*, in the Appendix at pages A-1 and A-31, respectively.

JURISDICTION

(i) On June 17, 1974, appellants (plaintiffs below) filed their "Verified Complaint for Declaratory Judgment and Injunctive Relief," invoking federal jurisdiction: Under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution; Under United States Code, Title 28, Chapter 85, Sections 1331 and 1343; Under United States Code, Title 28, Chapter 151 (Declaratory Judgments), Sections 2201 and 2202; Under United States Code, Title 28, Chapter 155, Sections 2281 and 2284; And under United States Code, Title 42, Chapter 21, Section 1983.

Appellants, a not-for-profit Missouri corporation and two practicing physicians, all engaged in providing medical and surgical procedures for the termination of pregnancy, sought to have the recently enacted "House Committee Substitute for House Bill No. 1211" declared unconstitutional on its face and to have appellees (defendants below) enjoined from applying or enforcing the same.

Declaratory relief was requested pursuant to 28 U.S.C., Section 2201, and a statutory three-judge panel was convened on June 19, 1974 pursuant to 28 U.S.C., Sections 2281 and 2284.

Trial in this cause was conducted on July 22 and 23, 1974, and on January 31, 1975, an opinion and order entered upholding all challenged sections of said legislation, with the sole exception of Section 6(1) which was held to be unconstitutional and its enforcement accordingly enjoined. Appellee Danforth filed his "Motion to Alter or Amend Judgment" in regard to said section 6(1) on February 6, 1975, (App. at p. A-33) and the same was denied by "Order" of the United States District Court on February 12, 1975, (App. at p. A-35).

In response to appellants' "Motion for Stay of Application and Enforcement of Statute, Pending Appeal to the United

States Supreme Court, and Authorities in Support Thereof," filed on or about February 7, 1975, this Honorable Court granted appellants' said motion under identifying number A-656 on February 18, 1975 (43 L.W. 3451).

(ii) The "Order, Judgment and Decree" and accompanying "Memorandum Opinion" of the statutory three-judge panel of the United States District Court of the Eastern District of Missouri, Eastern Division, denying appellants' request for declaratory judgment and injunctive relief, were entered on January 31, 1975. Appellants' "Notice of Appeal" was duly filed on February 5, 1975 in the United States District Court for the Eastern District of Missouri, Eastern Division (App. at p. A-36).

(iii) Jurisdiction of this Honorable Court to review by direct appeal the "Order, Judgment and Decree" of the United States District Court, denying to appellants the permanent injunction requested, is conferred by 28 U.S.C., Section 1253.

(iv) Cases which sustain the jurisdiction of this Honorable Court are: *Roe*, et al. v. *Wade*, 410 U.S. 113 (1973); *Sixty-Seventh Minnesota State Senate* v. *Beens*, et al., 406 U.S. 187 (1972); *Astol Calero-Toledo*, et al. v. *Pearson Yacht Leasing Co.*, — U.S. — (1974), 94 S.Ct. 2080, 40 L.Ed.2d 452; and *Gonzales*, et al. v. *Automatic Employees Credit Union*, et al., — U.S. — (1974), 94 S.Ct. —, 42 L.Ed.2d 249.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Ninth Amendment to the Constitution of the United States:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment to the Constitution of the United States, in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

House Committee Substitute for House Bill No. 1211

"Section 1. It is the intention of the general assembly of the state of Missouri to reasonably regulate abortion in conformance with the decisions of the supreme court of the United States.

Section 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:

(1) 'Abortion', the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) 'Viability', that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;

(3) 'Physician', any person licensed to practice medicine in this state by the state board of registration of the healing arts.

Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment;

(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion.

(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.

(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

Section 4. No abortion performed subsequent to the first twelve weeks of pregnancy shall be performed except where the provisions of section 3 of this act are satisfied and in a hospital.

Section 5. No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.

Section 6. (1) No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as

provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo.

(2) Whoever, with intent to do so, shall take the life of a premature infant aborted alive, shall be guilty of murder of the second degree.

(3) No person shall use any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive.

Section 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411, RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.

Section 8. Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 7 of this act by the attending physician and the woman shall certify in writing that she has been so informed.

Section 9. The general assembly finds that the method or technique of abortion known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy.

Section 10. 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

2. The forms shall be provided by the state division of health.

3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

Section 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years.

Section 12. Any practitioner of medicine, surgery, or nursing, or other health personnel who shall willfully and knowingly do or assist any action made unlawful by this act shall be subject to having his license, application for license, or authority to practice his profession as a physician, surgeon, or nurse in the state of Missouri rejected or revoked by the appropriate state licensing board.

Section 13. Any physician or other person who fails to maintain the confidentiality of any records or reports re-

quired under this act is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

Section 14. Any person who contrary to the provisions of this act knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action required by this act shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

Section 15. Any person who is not a licensed physician as defined in section 2 of this act who performs or attempts to perform an abortion on another as defined in subdivision (1) of section 2 of this act, is guilty of a felony, and upon conviction, shall be imprisoned by the department of corrections for a term of not less than two years nor more than seventeen years.

Section 16. Nothing in this act shall be construed to exempt any person, firm, or corporation from civil liability for medical malpractice for negligent acts or certification under this act.

Section A. Because of the necessity for immediate state action to regulate abortions to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

Section B. If any provision of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity does not affect the provisions or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

QUESTIONS PRESENTED

I. Whether "House Committee Substitute for House Bill No. 1211" (H.B. No. 1211), Section 2(2), redefining "viability" to be "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems", violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, et al. v. *Wade*, 410 U.S. 113 (1973) and *Doe*, et al. v. *Bolton*, et al., 410 U.S. 179 (1973)?

II. Whether H.B. No. 1211, Section 3(2), requiring various provisions as to the written consent of the patient for an abortion at all stages of pregnancy, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, *supra*, and *Doe*, *supra*?

III. Whether H.B. No. 1211, Section 3(3), requiring the written consent of a woman's spouse to an abortion at all stages of pregnancy, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, *supra*, and *Doe*, *supra*?

IV. Whether H.B. No. 1211, Section 3(4), requiring the written consent of an unmarried, less than eighteen years old woman's "one parent or person in loco parentis" to an abortion at all stages of pregnancy, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, *supra*, and *Doe*, *supra*?

V. Whether H.B. No. 1211, Section 7, requiring in the event of a live birth resulting from an abortion not performed to save the life or health of the mother at all stages of pregnancy, that

the parental rights of the mother and those of the father, if he consented to the abortion, shall be conclusively terminated and the child shall be an abandoned ward of the state, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe, supra,* and *Doe, supra*?

VI. Whether H.B. No. 1211, Section 9, prohibiting, after the first twelve weeks of pregnancy, the termination of pregnancy by saline amniocentesis or similar methods, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe, supra,* and *Doe, supra*?

VII. Whether H.B. No. 1211, Sections 10 and 11, requiring the completion and maintenance by physicians of certain forms and records relating to abortion at all stages of pregnancy, violate the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe, supra,* and *Doe, supra*?

STATEMENT OF THE CASE

Missouri "House Committee Substitute for House Bill No. 1211" was passed by the General Assembly of the State of Missouri on or about April 30, 1974, and was signed into law by the Honorable Christopher S. Bond, Governor of the State of Missouri, on June 14, 1974. The law, pursuant to Section A of the same, was effective immediately upon approval by the governor.

On June 17, 1975, appellants, a corporation operating as part of its program a medical clinic in Columbia, Missouri and serving seven rural counties, a physician and practicing obstetrician-gynecologist serving as Chairman of the Department and Professor of Obstetrics and Gynecology at the University of Missouri Medical School and a physician and practicing obstetrician and gynecologist within the St. Louis, Missouri metropolitan area, filed suit against the application and enforcement of the same. All appellants within their ordinary business and practice provide abortion services for their patients. Suit was filed on behalf of all physicians similarly situated and the class consisting of appellants' patients desiring to terminate their pregnancies.

Appellants' requests for a temporary restraining order and for a preliminary injunction were denied. Trial was conducted on July 22 and 23, 1974 and judgment rendered on January 31, 1975. Said judgment upheld the constitutionality of H.B. No. 1211, Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11, denied permanent injunctive relief as to the same, declared Section 6(1) to be unconstitutional and issued a permanent injunction against the enforcement of same.

A motion by appellee Danforth to amend the judgment as to Section 6(1) was filed on or about February 6, 1975 and denied by the United States District Court on February 12, 1975.

Appellants filed their "Notice of Appeal" herein on February 5, 1975.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents important questions related to the extent to which states may regulate the abortion decision and its effectuation and still conform to the holdings of this Honorable Court in *Roe, supra* and *Doe, supra,* and be consistent with the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. The questions presented herein have not been expressly confronted by this Honorable Court. Numerous states have sought to legislate in regard to these ques-

tions. In each instance such analogous statutes have been judicially challenged, they have been voided as unconstitutional by reviewing courts.

Since January 22, 1973, legislative attempts in this area and subsequent judicial experience and practical effect have amply demonstrated the necessity for further definitive and explicative statements by this Honorable Court in the area of abortion. This has proven to be necessary so that state and local legislative bodies will not continue cavilierly to pass legislation which violates the spirit, intent and meaning of this Honorable Court's opinions in *Roe, supra,* and *Doe, supra,* and of the federal constitution.

The decision below appealed from is *unanimously* inconsistent with and contrary to post *Roe, supra,* and *Doe, supra,* decisions rendered by both federal and state appellate courts.

This appeal presents novel issues of profound, national significance, intimately affecting more than one million American citizens each year. These same issues are presently pending before lower, federal appellate courts. The parties and courts are in need of and await the wisdom and leadership of this Honorable Court.

THE QUESTIONS

Introduction

On January 22, 1973, this Honorable Court rendered its historic decisions recognizing the constitutional right of women to terminate pregnancy in consultation with their physicians (*Roe, supra,* and *Doe, supra*). The two decisions, "of course, are to be read together" (*Roe, supra,* at p. 165). It is difficult to recall other decisions of modern times which have had such a profound, intimate, irreparable and daily impact upon the lives of

so many citizens of this country. A minimum of 892,000 abortions were performed in the United States, of which a minimum of 9,100 were performed in Missouri, during the calendar year of 1974. (See, *Weinstock, Edward,* et al., "Legal Abortions in the United States Since the 1973 Supreme Court Decision," *Family Planning Perspectives,* Vol. 7, No. 1, Jan./Feb. 1975). Tragically, it is this very right which invidiously was being denied to women of the State of Missouri by the statute, herein challenged, prior to the issuance by this Honorable Court of a stay pending this appeal.

The challenged legislation had impermissibly intruded into the decision-making privacy of the woman and the medical province of her physician. This Honorable Court unequivocably denied to the state the right to dictate specific medical policy and procedure in the constitutionally protected area of abortion, a right the State of Missouri has blatantly usurped.

To argue, as appellees have here below, that this legislation does not prohibit abortions is specious. While it may be true that it does not absolutely prohibit abortion, neither did the original Missouri statute adopted in 1835 (Mo.R.S., Section 559.100). The latter was voided in *Rodgers,* et al. v. *Danforth,* et al. (W.D.Mo., No. 18360-2, May 18, 1973, *not reported*), *affirmed,* 414 U.S. 1035 (1973). It excepted procedures necessary to preserve the patient's life. The fine line differentiating between prohibition, restriction and regulation is oftentimes illusionary, particularly when it involves a constitutionally protected "fundamental right," such as abortion. (See, *Roe, supra,* at p. 155).

This cause challenges the constitutionality of Missouri "House Committee Substitute for House Bill No. 1211," as passed by the General Assembly of the State of Missouri on or about April 30, 1974 and signed into law by the Honorable Christopher S. Bond, Governor of the State of Missouri, on or about June 14, 1974. Its constitutionality was questioned by Governor Bond

at the moment of the Bill's signing. Appellants believe that, pursuant to Section B of the same, the statute is severable. Appellants did not seek to invalidate the legislation in its entirety, but specifically challenged the following cited portions: Section 2(2); Section 3(2); Section 3(3); Section 3(4); Section 6(1); Section 7; Section 9; Section 10; and Section 11.

The removal of emotionalism and personal feelings from a reading of *Roe, supra,* and *Doe, supra,* leaves no equivocation as to the meaning and intent of the language. The two decisions effectively voided the then existing laws regulating abortion in every state of the union. Since January 22, 1973, a flurry of legislative and administrative action has attempted to thwart and to curtail the full effect of this Honorable Court's decisions. On each and every occasion the same have been judicially challenged, the federal courts have struck them down, regardless of their nature or ingenuity. Many have sought to reinstitute criminal penalties and regulation, such as the case at bar. (*E.g. Word,* et al. v. *Poelker,* et al., 495 F.2d 1349 [8th Cir. 1974]; *Coe,* et al. v. *Gerstein,* et al., 376 F.Supp. 695 [S.D. Fla. 1973]; and *Wolfe,* et al. v. *Schroering,* et al., — F.Supp. — [W.D. Ky., No. C-74-186-L(B), Nov. 19, 1974]). Others have sought to restrict the performance of abortions in public hospitals. (*E.g. Nyberg,* et al. v. *The City of Virginia,* et al., 495 F.2d 1342 [8th Cir. 1974], *appeal dismissed and cert. denied,* — U.S. — (1974), 95 S.Ct. 169, 42 L.Ed.2d 136, and *Doe,* et al. v. *Hale Hospital,* et al., 500 F.2d 144 [1st Cir. 1974], *cert. denied,* — U.S. —, 43 L.W. 3411 [Jan. 27, 1975]). Others have sought to prohibit state medicaid payments for abortion. (*E.g. Doe,* et al. v. *Rose,* 499 F.2d 1112 [10th Cir. 1974], and *Wulff,* et al. v. *Singleton,* — F.2d — [8th Cir., No. 74-1484, Dec. 31, 1974]).

I

"House Committee Substitute for House Bill No. 1211" (H.B. No. 1211), Section 2(2), Redefining "Viability" to Be "That Stage of Fetal Development When the Life of the Unborn Child May Be Continued Indefinitely Outside the Womb by Natural or Artificial Life-Supportive Systems," Violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the Rulings of This Honorable Court in *Roe,* et al. v. *Wade,* 410 U.S. 113 (1973), **and** *Doe,* et al. v. *Bolton,* et al., 410 U.S. 179 (1973).

Section 2(2) redefines viability, directly contrary to the explicit holdings on the identical question in *Doe,* et al. v. *Rampton,* et al., 366 F.Supp. 189 (D. Utah 1973); *Hodgson,* et al. v. *Anderson,* et al., 378 F.Supp. 1008 (D. Minn. 1974), *appeal dismissed,* sub nom. *Spannaus,* et al. v. *Hodgson,* et al., — U.S. —, 43 L.W. 3412 (Jan. 27, 1975); and *Planned Parenthood Association, Inc.,* et al. v. *Fitzpatrick,* et al., *filed Sep. 20, 1974 and temporary injunction issued* (E.D. Pa., No. 74-2440), *application for vacation of preliminary injunction denied,* sub nom. *Wohlgemuth,* et al. v. *Planned Parenthood of Southeastern Pennsylvania, Inc.,* et al., — U.S. —, 43 L.W. 3387 (No. A-285, Jan. 13, 1975).

The addition of the adverb "indefinitely" and other inherent subtleties are contrary to this Honorable Court's more restrictive interpretations in terms of "meaningful life" (*Roe, supra,* at p. 163) or in temporal terms of "seven months" (*Roe, supra,* at p. 160).

See also *Word,* et al. v. *Poelker,* etc., et al., 495 F.2d 1349, 1351 (8th Cir. 1974), for violation of the established trimester differentiation test and the extra layer and burden of regulation test, as well as *Roe, supra,* and *Doe, supra.*

II

H.B. No. 1211, Section 3(2), Requiring Various Provisions as to the Written Consent of the Patient for an Abortion at All Stages of Pregnancy, Violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the Rulings of This Honorable Court in *Roe*, Supra, **and** *Doe*, Supra.

Section 3(2) requires various forms of express consent from the patient, directly contrary to the explicit holdings on the identical question in *Rampton, supra; Hodgson, supra; Wolfe*, et al. v. *Schroering*, et al., — F.Supp. — (W.D. Ky., No. C-74-186-L[B], Nov. 19, 1974); and ***Planned Parenthood Association, Inc., supra.*** See also *Word, supra,* for violation of the established trimester differentiation test and the extra layer and burden of regulation test, as well as *Roe, supra,* and *Doe, supra.* In addition, such requirements far exceed standard consents obtained by physicians or facilities for more drastic medical procedures than abortion.

III

H.B. No. 1211, Section 3(3), Requiring the Written Consent of a Woman's Spouse to an Abortion at All Stages of Pregnancy, Violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the Rulings of This Honorable Court in *Roe*, Supra, **and** *Doe*, Supra.

Section 3(3) requires spousal consent, regardless of whether the spouse has impregnated the woman and regardless of whether the whereabouts of the spouse are known, directly contrary to the explicit holdings on the identical question in *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972); *Doe*, et al. v. *Bellin Memorial Hospital*, et al., 479 F.2d 756 (7th Cir. 1973);

Coe, et al. v. *Gerstein*, et al., 376 F.Supp. 695 (S.D. Fla. 1973); *Planned Parenthood Association, Inc., supra; Doe* v. *Doe*, et al., — Mass. Rep. — (1974), 314 NE.2d 128, and *Jones* v. *Smith*, et al., 278 So.2d 339 (Fla. Ct.App. 1973), *cert. denied*, 415 U.S. 958 (1974). See also *Word, supra,* for violation of the established trimester differentiation test and the extra layer and burden of regulation test, as well as *Roe, supra,* and *Doe, supra.* Based upon the uncontradicted evidence at trial, forty-nine women per month are denied abortions, by reason of this section, at one medical facility alone, providing first trimester procedures only and situated in St. Louis, Missouri.

This section permits the state to delegate to the spouse the right to veto an abortion decision made by his wife, although the authority to veto such a decision has been denied to the state itself by this Honorable Court in *Roe, supra,* and *Doe, supra.*

This right extended to spouses, even though they may not have impregnated their wives nor be members of the household, and not extended to putative fathers raises serious questions of equal protection and due process under *Stanley* v. *State of Illinois*, 405 U.S. 645 (1972).

IV

H.B. No. 1211, Section 3(4), Requiring the Written Consent of an Unmarried, Less Than Eighteen Years Old Woman's "One Parent or Person in Loco Parentis" to an Abortion at All Stages of Pregnancy, Violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the Rulings of This Honorable Court in *Roe*, Supra, **and** *Doe*, Supra.

Section 3(4) requires parental consent for any minor under eighteen years of age, directly contrary to the explicit holdings

on the identical question in *Foe* v. *Vanderhoof*, etc., et al., — F. Supp. — (D. Colo., No. 74-F-418, Feb. 5, 1975); *Planned Parenthood Association, Inc., supra; Wolfe, supra; Coe, supra; Rampton, supra; Word, supra; Washington* v. *Koome*, — Wash. —, 43 L.W. 2337 (Wash. S.Ct., Jan. 7, 1975); and *Ballard*, et al. v. *Anderson*, etc., 4 Cal.3d 873 (1971), 484 P.2d 1345, 95 Cal.Rptr. 1. See also *Word, supra*, for violation of the established trimester differentiation test and the extra layer and burden of regulation test, as well as *Roe, supra, Doe, supra*, and *In re Gault*, 387 U.S. 1 (1967). Based upon the uncontradicted evidence at trial, thirty-one women per month are denied abortions by reason of this section, at one medical facility alone, providing first trimester procedures only and situated in St. Louis, Missouri.

This section permits the state to delegate to a parent the right to veto an abortion decision made by unmarried, female minor, although the authority to veto such a decision has been denied to the state itself by this Honorable Court in *Roe, supra*, and *Doe, supra*.

V

H.B. No. 1211, Section 7, Requiring That in the Event of a Live Birth Resulting From an Abortion Not Performed to Save the Life or Health of the Mother at All Stages of Pregnancy, That the Parental Rights of the Mother and Those of the Father, if He Consented to the Abortion, Are Conclusively Terminated and the Child Shall Be an Abandoned Ward of the State, Violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the Rulings of This Honorable Court in *Roe*, supra, **and** *Doe*, supra.

Section 7 provides that in the event of a live birth when an abortion was intended, then all parental rights are exclusively and conclusively terminated and the child becomes a ward of

the state. This is directly contrary to the explicit holdings on the identical question in *Rampton, supra*, and *Stanley* v. *State of Illinois*, 405 U.S. 645 (1972). See also *Word, supra*, for violation of the established trimester differentiation test and the extra layer and burden of regulation test, as well as *Roe, supra*, and *Doe, supra*.

Contrary to this Honorable Court's previous decisions, this Section equates a fetus and a living child for all parents desiring to terminate a pregnancy. It is extremely punitive and designed to discourage abortions. Succeeding Section 8 requires the physician to inform verbally the patient of the provisions of Section 7 and the patient to certify in writing the fact of having been so informed. Additional problems are raised in light of *Stanley, supra*, inasmuch as putative fathers are not required under Section 3(3) to consent initially and, therefore, would not suffer the termination of parental rights imposed upon male, consenting parental spouses.

VI

H.B. No. 1211, Section 9, Prohibiting, After the First Twelve Weeks of Pregnancy, the Termination of Pregnancy by Saline Amniocentesis or Similar Methods, Violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the Rulings of This Honorable Court in *Roe*, supra, **and** *Doe*, supra.

Section 9 absolutely prohibits saline induction or similar methods of second or later trimester abortions. The uncontradicted evidence at trial was: (a) That a minimum of seventy-five per cent of all second or later trimester abortions within the United States are done by this method; (b) That the customary, alternative methods of hysterotomy and hysterectomy, routinely performed within the United States, carry mortality rates of at least fourteen times higher than that of the saline

method and neither hysterotomy nor hysterectomy is prohibited by this section; (c) That the mortality rate for childbirth in the United States is higher than the mortality rate for saline induction; And, (d) That the proposed alternative method of prostaglandin instillation, while *perhaps* slightly safer than saline, is not readily available on the open market nor widely used within the United States. Not a single word of testimony nor scintilla of evidence was offered which indicated any adverse effect upon women resulting from having undergone saline inductions in Missouri prior to June 14, 1974. This section is directly contrary to the explicit holding on the identical question in *Wolfe, supra*, and has precluded effectively all post first trimester abortions within the State of Missouri since the date of its enactment. See also *Word, supra*, for violation of the established trimester differentiation test and the extra layer and burden of regulation test, as well as *Roe, supra*, and *Doe, supra*.

This Honorable Court was careful to frame the parameters in which reasonable state regulation for maternal health reasons, subsequent to the first trimester, could be imposed. (See, *Roe, supra*, at pp. 150, 163, 165-166, and *Bolton, supra*, at p. 199.)

Further, this Section unconstitutionally favors the alternative of bearing children over the alternative of saline abortion, although the uncontradicted testimony was that saline abortion is safer for the patient than childbirth.

VII

H.B. No. 1211, Sections 10 and 11, Requiring the Completion and Maintenance by Physicians of Certain Forms and Records Relating to Abortion at All Stages of Pregnancy, Violate the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the Rulings of This Honorable Court in *Roe*, supra, **and** *Doe*, supra.

Sections 10 and 11 provide for numerous record keeping provisions directly contrary to the explicit holdings on the identical question in *Rampton, supra; Word, supra;* and *Planned Parenthood Association, Inc., supra.* See also *Word, supra*, for violation of the established trimester differentiation test and the extra layer and burden of regulation test, as well as *Roe, supra*, and *Doe, supra*.

CONCLUSION

Not a single provision challenged hereinbelow has been sustained, subsequent to January 22, 1973, by any other court and, in fact, on each and every occasion the same have been challenged, they have been struck down by reason of unconstitutionality.

This Honorable Court in *Roe, supra*, placed upon appellees the burden of justifying the arbitrary and capricious infringement of fundamental rights, imposed by the challenged sections.

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (410 U.S. at p. 155).

To permit the catastrophic and irreparable effects of this invidious and pernicious legislation to survive this challenge by appellants is to deny to thousands of women in Missouri, the equal protection of the laws, as defined by this Honorable Court in *Roe, supra,* and *Doe, supra,* on January 22, 1973 and the subsequent, unanimous line of decisions interpreting the same.

For the reasons set out in this jurisdictional statement, this Honorable Court should note jurisdiction and set this case down upon its docket for plenary review with briefs and oral arguments on the merits.

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Certificate of Service

I, the undersigned attorney for appellants and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33 I have caused to be served true and correct copies of the foregoing *Jurisdictional Statement* upon each party required to be so served, by depositing said copy in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to The Honorable John C. Danforth, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri 65101 and to Mr. J. Brendan Ryan, Circuit Attorney of the City of St. Louis, 1320 Market Street, St. Louis, Missouri 63103.

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APPENDIX

In the United States District Court
Eastern District of Missouri
Eastern Division

Planned Parenthood of Central Missouri, a Missouri Corporation, David Hall, M.D., and Michael Freiman, M.D., Plaintiffs,

vs.

John C. Danforth, Attorney General of the State of Missouri, and J. Brendan Ryan, Circuit Attorney of the City of St. Louis, Missouri, Defendants.

No. 74-416C (A)

Before Webster, Circuit Judge, Wangelin and Harper, District Judges.

Harper, Senior District Judge.

MEMORANDUM OPINION

This is an action by plaintiffs seeking to have declared as unconstitutional certain provisions of House Bill No. 1211 (hereinafter referred to as House Bill 1211), passed by the Missouri General Assembly on April 30, 1974, and signed into law on June 14, 1974, and for an injunction against the enforcement of the challenged provisions of the Bill.

Plaintiffs are Planned Parenthood of Central Missouri (hereinafter referred to as Planned Parenthood), a not-for-profit Missouri corporation which maintains facilities for the performance

of abortions in Columbia, Missouri; David Hall, a resident of the State of Missouri who supervises abortions at the Columbia Planned Parenthood facility as a duly licensed physician; and Michael Freiman, a resident of Missouri who performs abortions as a duly licensed physician at the Barnes and Jewish Hospitals in St. Louis, Missouri, and at a St. Louis abortion clinic operated by Reproductive Health Services, Inc. Plaintiffs bring this action on their own behalf and on behalf of the class of physicians desiring to perform pregnancy termination services, and on behalf of the class of their patients who seek abortions. The complaint charges that certain provisions of House Bill 1211 are invalid in that they deprive plaintiffs and their patients of various alleged constitutional rights, including the privacy of the doctor-patient relationship, the physician's right to the free exercise of medical practice, the right of a woman to determine whether to bear children, the right to life of their patients and the right to receive adequate medical treatment, all in violation of the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution. The petition further alleges that the legislation is violative of the rights of due process and equal protection guaranteed plaintiffs and their patients under the Constitution, and that it imposes a cruel and unusual punishment upon women by forcing them to bear pregnancies which they conceive.

Jurisdiction of the Court is invoked under 28 USC §§ 1331, 1343, 2201, 2202, 2281 and 2284, and under 42 USC 1983. Because of the claim for injunctive relief, a three-judge court was convened pursuant to 28 USC 2281.

In their initial application for a temporary restraining order plaintiffs challenged only Sections 2(2), 6(1), 7 and 9. At the hearing for a preliminary injunction plaintiffs expanded their challenge to include Sections 3(3) and 3(4). During discovery plaintiffs additionally attacked Sections 3(2), 10 and 11. On the day defendants submitted their trial brief, plaintiffs advised

defendants of their intention to challenge Sections 5, 6(3) and 8, and the next day Section 4 was included. On the day of trial defendants' motion for continuance as to Sections 4, 5, 6(3) and 8 was granted, and the Court proceeded to trial on the other provisions and set a later date to complete the trial on the late challenged provisions. At the close of the hearing plaintiffs withdrew their challenge to those provisions.

The challenged portions of House Bill 1211 provide as follows:

> "Section 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:
>
> • • •
>
> "(2) 'Viability', that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;
>
> • • •
>
> "Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:
>
> • • •
>
> "(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion.
>
> "(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.
>
> "(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless

the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

* * *

"Section 6. (1) No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo.

* * *

"Section 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411 (sic), RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.

* * *

"Section 9. The general assembly finds that the method or technique of abortion known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose

of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy.

"Section 10. 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

"2. The forms shall be provided by the state division of health.

"3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

"Section 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years."

House Bill 1211 concludes with a clause declaring that the provisions of the Act are severable, so that judicial invalidation of any provision shall not affect such remaining provisions as can be given effect in the absence of the invalid provision.

The threshold question for consideration is the justifiability of this litigation. The individual plaintiff-physicians have standing as to each of the challenged provisions of House Bill 1211 by

reason of the criminal sanctions imposed under that Act. In holding that the Georgia physicians who attacked that state's abortion legislation in *Doe* v. *Bolton*, 410 U. S. 179 (1973), presented a justiciable controversy, the Supreme Court stated at page 188 of their opinion:

> "The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief. *Crossen* v. *Breckenridge*, 446 F. 2d 833, 839-840 (CA6 1971); *Poe* v. *Menghini*, 339 F. Supp. 986, 990-991 (Kan. 1972)."

Section 6(1) of House Bill 1211 provides that an attending physician who fails to exercise the prescribed standard of care to protect an aborted fetus shall be deemed guilty of manslaughter. In addition, Section 14 provides that any person who performs an abortion in violation of the requirements set forth elsewhere in the Act will be guilty of a misdemeanor. This statute is "recent and not moribund", *Doe* v. *Bolton*, supra, and we may assume that violations thereof will be actively prosecuted.

Due to the obvious standing of the physician-plaintiffs in this case, the Court deems it unnecessary to pass upon the question of Planned Parenthood's standing to challenge House Bill 1211. See *Doe* v. *Bolton*, supra, page 189.

In January of 1973, the United States Supreme Court in the case of *Roe* v. *Wade*, 410 U. S. 113, declared unconstitutional the Texas criminal abortion statutes which prohibited performance of all abortions except where necessary to save the life of the mother. In doing so, the Court made it clear that its opinion was not intended to prevent the state from limiting or even

proscribing abortions under certain circumstances. The Court stated at pages 153-154:

> "[A]ppellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. *With this we do not agree.*
>
> "We • • • conclude that the right of personal privacy includes the abortion decision, but that this right is *not unqualified* and must be considered against *important state interests in regulation.*" (Emphasis added.)

These state interests include the right to protect maternal health, which justifies regulation of abortion procedures after the first twelve weeks of pregnancy, and the interest in protecting potential human life which allows the state to prohibit abortions once the fetus has achieved viability.

The companion case of *Doe* v. *Bolton*, 410 U. S. 179 (1973), emphasized the Court's position with respect to uncontrolled abortion. At page 189 of that opinion the Court reiterated:

> "Roe v. Wade, supra, sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand."

Subsequent to these decisions, Missouri's criminal statute, proscribing abortions where not necessary to save the life of the woman or the unborn child, was declared unconstitutional. Thereafter, the Missouri General Assembly labored through two legislative sessions in order to perfect a bill which would regulate abortion within the parameters established by the Supreme Court. The result is House Bill 1211. This Court has engaged in a careful scrutiny of each of the challenged provisions of this bill and finds that with the exception of Section 6(1) they conform to the *Roe* and *Doe* decisions in every material respect.

Section 2 (2): Section 5 of House Bill 1211 prohibits performance of abortions except to preserve the life or health of the mother once the fetus is viable. Plaintiffs do not challenge section 5, rather it is their position that the definition of viability in section 2(2) is invalid because it fails to distinguish between trimesters of pregnancy and because the definition would have the result, when read in conjunction with section 5, of forbidding non-therapeutic abortions at an earlier point than is constitutionally permissible under *Roe* and *Doe*. Defendants maintain that the definition adapted by the Missouri legislature is in substance the same as that employed by the Supreme Court.

In *Roe*, the Court defined the point at which the fetus becomes "viable" as "potentially able to live outside the mother's womb, *albeit with artificial aid*". (Emphasis added). 410 U. S. at page 160. The definition of viability, in House Bill 1211 (Section 2(2)) is essentially the same as that set forth in *Roe*. If anything, the Missouri definition is more restrictive than that suggested in Roe, since it requires that the life of the fetus be capable of being continued "indefinitely" outside the womb before it is to be considered viable.

Plaintiff Hall stated in that portion of his deposition offered at the trial that viability is a difficult stage to assess, but that he agreed with the definition set forth in Section 2(2) of the statute (Tr. 369).

Plaintiffs suggest that in order to be constitutionally valid, a statutory definition of viability should establish a specific point in gestation when the fetus is to be considered viable. Plaintiffs suggest that the period subsequent to the twenty-fourth week, or approximately the end of the second trimester, would be appropriate. While *Roe* v. *Wade* did refer to the fact that viability is usually reached at twenty-four to twenty-eight weeks, 410 U. S. at page 160, the Supreme Court did not elect to preempt the physician's judgment in making this determination. Whereas

the Court set the first "compelling point," or the period after which the state may regulate abortion in ways related to the mother's health, at the end of the first trimester, it established the second "compelling" point, after which the state may protect fetal life, at "viability" rather than a specific period after conception, 410 U. S. at page 163-165.

We do not think it is properly the function of the legislature or the courts to fix viability at an inflexible point in gestation. The time when viability is achieved will vary with each pregnancy, and the determination of whether a fetus is viable in a particular case must be left to the attending physician. Section 2(2) has precisely this effect.

Section 3(2): Section 3(2) requires a woman's informed consent in writing prior to the abortion. The Supreme Court in *Roe* enumerated a few of the many factors which must be weighed by a woman who is considering an abortion. The Court stated, 410 U. S. at page 153:

> "Maternity, or additional offspring, may force upon the woman a distressful life and future; psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician *necessarily will* consider in consultation." (Emphasis added.)

Given the fact that even with counseling the decision of whether to terminate a pregnancy is often a stressful one (Warren Tr. 30, Anderson Tr. 351-352), it is imperative that a woman be well advised of the options available, and the physi-

cal and psychological ramifications of choosing a particular course of action.

After discussing the development of judicial recognition of a constitutional right of privacy, the Supreme Court stated in *Roe* v. *Wade*, supra, at page 154, that, "We, therefore, conclude that the right of personal privacy includes the abortion decision."

It is clear from the Court's opinion that although the abortion decision is to be made in consultation with a responsible physician, the ultimate decision is not the physician's to make. The consent requirement of Section 3(2) insures that the pregnant woman retains control over the discretions of her consulting physician.

Furthermore, written consent is a common practice of physicians for surgical procedures. This portion of the statute does not single out the abortion procedure, but merely includes it within the category of medical operations for which consent is required.

Sections 3(3) and 3(4): Sections 3(3) and 3(4) require either the written consent of the woman's spouse, or if she is single and under eighteen years of age, the consent of a parent or one in loco parentis. In deciding *Roe* and *Doe*, the Supreme Court declined to discuss the rights of the woman's spouse or parents to participate in the abortion decision because neither of the statutes dealt with in those cases contained provisions for spousal or parental consent, 410 U. S. page 165, Footnote 67.

Roe v. *Wade* held that a woman's limited right to privacy in the area of abortion outweighed the state's interest in protecting her health during the period up to the end of the first trimester of pregnancy when an abortion may be safer than bearing the pregnancy to term, and that this right to privacy

also outweighed the state's interest in protecting the life of the fetus prior to the point when that fetus becomes viable. Thus, the only state interests involved in that decision were the protection of maternal health and the protection of the fetus.

Historically the courts have recognized that the marriage entity is one which is subject to the state's control. In approving Utah's ban on polygamy, the Supreme Court in *Reynolds* v. *United States*, 98 U. S. 145 (1878), stated at page 165:

> "Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal."

In *Maynard* v. *Hill*, 125 U. S. 190 (1888), the Court reiterated that the marriage entity provides the foundation of our societal structure. At page 205 the Court stated:

> "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution."

More recently the Court has based the right of a state to regulate the status of marriage upon the need to protect the "regularity and integrity of the marriage relation." *Estin* v. *Estin*, 334 U. S. 541, 546 (1948).

Traditional permissible state regulation, therefore, has involved not only laws concerning formulation and dissolution

of the relationship but also legislation designed to protect the integrity of the marriage unit. In addition to the polygamy laws discussed in *Reynolds* v. *United States*, supra, typical examples of such legislation include the imposition of punishment for acts such as adultery and bigamy.

Procreation has been held to be a fundamental aspect of the marriage relationship. *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942). Testimony and exhibits introduced at the trial of the instant case establish that there is a direct relationship between induced abortions and the incidence of infertility, premature and still births resulting from subsequent pregnancies (Dr. Backer, Tr. 219, 222-223, Defts' Exs. V, O, S and T). Infants born prematurely are in turn subject to numerous physical and mental defects (Dr. Backer, Tr. 221-222). We are, therefore, not concerned merely with a husband's interest in seeing that a particular fetus conceived by the partners to the marriage is carried to term. We are also confronted with the fact that the decision of whether or not to abort one pregnancy may have a profound effect on the future reproductive capacity of the marriage.

Other testimony at the trial merely supports what should be obvious—that those things which foster mutuality and trust in a marriage tend to strength the relationship and the institution of marriage (Dr. Kenkel, Tr. 235-236). In the area of procreation, which is a fundamental aspect of that relationship, the state's interest in protecting the integrity of the marriage unit and the mutuality of decisions made by the partners to that unit becomes particularly compelling. It is difficult to see how marital harmony could possibly be preserved if husbands were precluded from participating in decisions which affect the very essence of the marriage relationship.

The interest of the state in protecting the mutuality of decisions vital to the marriage relationship is compelling at all times during the marriage. It does not vary in importance at different times

during the relationship, and certainly is not subject to distinctions between trimesters of the wife's pregnancy.

In considering the validity of the parental consent requirement it is recognized that the interest in protecting the mutuality of a marriage relationship is not present. Nevertheless, "the state's authority over children's activities is broader than over like actions of adults." *Prince* v. *Massachusetts*, 321 U. S. 158, 168 (1945). In *Ginsberg* v. *New York*, 390 U. S. 629 (1968), the Supreme Court pointed out that the state has a duty to support parents in the discharge of their responsibility for the care of their children. The Court stated at page 639:

> "The well-being of its children is of course within the State's constitutional power to regulate, • • •. [C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. • • • [P]arents and others • • • who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."

In fact, the state may not unduly interfere with that parental responsibility. *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972), l.c. 231-234; *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1924), l.c. 534-35.

The state's interest in safeguarding the authority of the family relationship would appear to this Court to be a compelling basis for allowing regulation of a minor's freedom to consent to an abortion. The requirement of parental consent in section 3(4) of House Bill 1211 does not single out the abortion procedure, since it is the practice of hospitals and physicians to require that a minor's parent consent to other surgical treatment as well.

In discussing the validity of Section 3(2) above, we held that the consent of the woman is an indispensable prerequisite to ob-

taining an abortion. Yet a person under the age of majority is deemed incapable of giving legal consent. We do not believe that the Supreme Court, in recognizing a woman's limited right to obtain an abortion in *Roe* and *Doe*, intended those decisions to have the effect of emancipating children in that respect. Testimony at the trial of this case disclosed that children as young as ten years old have sought abortions (Widdicombe, Tr. 164). A girl of that age cannot be presumed capable of making a decision as profound as the abortion decision without proper advice and counsel of her parents or a person in loco parentis.

We do not believe that that in weighing the state's interests in protecting maternal health and fetal life, the Supreme Court in *Roe* v. *Doe* intended to preclude the consideration of other fundamental state interests. The consent requirements of the Missouri abortion law are justified by such other compelling interests.

Section 6(1): The first sentence of Section 6(1) prescribes the standard of care which a person performing an abortion must exercise for the protection of the fetus, without reference to any particular stage of pregnancy. The second and third sentences of this provision impose criminal and civil liability for failure to "take such measures to encourage or sustain the life of the child," when "the death of the child results" from such failure. While it is obvious that the state can legislate to protect a live born infant, and we have pointed out at the outset of our discussion on the merits that *Roe* would permit the state to legislate on behalf of the fetus after the point of viability is achieved, the difficulty with Section 6(1) is that it imposes a standard of care for protection of the fetus which would apply at any stage of pregnancy.

Defendants argue that the proper construction to be given this section is that it requires attending medical personnel to take positive action only subsequent to an abortion in the event

the fetus is aborted alive. Reflection upon the language employed convinces us otherwise. While the second sentence speaks of sustaining the life of the "child," clearly referring to a live born infant, the first sentence directs that a person performing an abortion must protect the life and health of the "fetus." The Court, therefore, holds that the first sentence of Section 6(1) is unconstitutionally overbroad for failure to exclude the stage of pregnancy prior to viability.

Section 7: Section 7 provides that where a live infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the Juvenile Court, and the rights of the parents consenting to the abortion shall be terminated. This section also requires the attending physician to forthwith notify the juvenile court of the existence of such live born infant. All of plaintiffs' several arguments that such summary termination is violative of due process must give way to the reality of the circumstances surrounding the occurrence of a live birth during an attempted abortion. The immediate concern must be for the care and protection of the infant. The fate of such a live born infant is surely of as much interest to the state as the interest in potential human life which the state can protect under *Roe*.

In the rare instance in which a live birth would result from an attempted abortion the state would be justified in assuming immediate temporary custody of the unwanted child. It is a simple matter for the juvenile court to insure that parents of such a child be given an adequate opportunity to be heard before parental rights are permanently terminated. Section 7 specifically provides that the parents of a child aborted alive shall have no parental rights as if their "rights had been terminated pursuant to section 211.411" (sic) of the Missouri Revised Statutes. RSMo. 211.441 sets forth the circumstances under which parental rights may be terminated. These circum-

stances include abandonment of the child, which is exactly the situation Section 7 is designed to protect. Chapter 211 of the Missouri statutes provides for notice, an opportunity for the parents to be heard and present testimony on their behalf, right to counsel and right to a jury trial of the issues. House Bill 1211 thus incorporates by reference statutory due process guarantees which provide adequate protection to the parents of a live aborted child who might desire to regain custody of such a child.

Nor can this Court find fault of constitutional magnitude with respect to the reporting requirement of Section 7. A report of every birth in Missouri must currently be filed with the state division of health by the physician, midwife, or other person in attendance at the birth. RSMo. 193.100. Section 7 of the challenged legislation simply requires that in certain instances the attending physician must also report the existence of a live birth to the juvenile court. The inclusion of such reporting acts within the state's police power is not questioned. The requirement that a live birth resulting from an attempted abortion be reported to the juvenile authorities in addition to the division of health does not impose an undue burden upon attending physicians.

Section 9: Section 9 prohibits use of the saline amniocentesis method of abortion after the first twelve weeks of pregnancy. Plaintiffs contend that this provision is invalid for the reason that it invades the province of the physician by restricting his exercise of medical judgment in performing abortions.

In summarizing the effect of its decision in *Roe* v. *Wade*, supra, the Supreme Court stated at page 165-166 of that opinion:

> "This holding, we feel, is consistent with the relative weights of the respective interest involved, with the lessons and examples of medical and legal history, with the lenity

> of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment *up to the points* where important state interests provide compelling justifications for intervention." (Emphasis added.)

The Court specifically held that:

> "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. * * * [A]fter this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." Id, at page 163.

Thus the judgment of the physician is only unfettered during the first twelve weeks of pregnancy. State regulation of the abortion procedure is not an invalid infringement upon the medical judgment of the physician after the first trimester unless the regulation is not reasonably related to maternal health. Section 9 seeks only to proscribe the saline method during the period subsequent to the first trimester. The only question remaining is whether prohibition of this particular method of abortion is within the power of the state legislature as being "reasonably related" to the protection of maternal health.

The record of trial discloses that use of the saline method exposes a woman to the danger of severe complications, regardless of the skill of the physician or the precaution taken. Saline may cause one or more of the following conditions: Disseminated intravascular coagulation or "consumptive coagulopathy"

(disruption of the blood clotting mechanism [Dr. Warren, Tr. 57-58; Dr. Klaus, Tr. 269-270; Dr. Anderson, Tr. 307; Defts' Exs. H & M]), which may result in severe bleeding and possibly death (Dr. Warren, Tr. 58); hypernatremia (increase in blood sodium level), which may lead to convulsions and death (Dr. Klaus, Tr. 268); and water intoxication (accumulated water in the body tissue which may occur when oxytoxin is used in conjunction with the injection of saline), resulting in damage to the central nervous system or death (Dr. Warren, Tr. 76; Dr. Klaus, Tr. 270-271; Dr. Anderson, Tr. 310; Defts' Ex. L). There is also evidence that saline amniocentesis causes massive tissue destruction to the inside of the uterus (Dr. Anderson, Tr. 308).

Still, as plaintiffs have pointed out, the fact that saline presents a serious threat to the health of a woman undergoing this technique of abortion is not determinative of the issue. Every known medical procedure involves a certain degree of risk to the patient. The reason given by the Supreme Court in holding that a state may not regulate the abortion procedure on the basis of the mother's health until the end of the first trimester was "because of the now-established medical fact * * * that until the end of the first trimester mortality in abortion may be *less* than mortality in normal childbirth." (Emphasis added.) *Roe* v. *Wade*, supra, at page 163.

Testimony at trial established that the mortality rate in childbirth is approximately twenty per one hundred thousand (Dr. Warren, Tr. 44; Dr. Kerenyi, Tr. 94); mortality with saline is approximately fifteen per one hundred thousand (estimates range from twelve to twenty-five per one hundred thousand; Dr. Warren, Tr. 43-44; Dr. Kerenyi, Tr. 89; Dr. Anderson, Tr. 329-330). Therefore, the validity of the Missouri legislature's refusal to permit use of the saline method after the twelfth week of pregnancy must turn on the availability of safe alternative methods of inducing abortions.

Alternative procedures for inducing midtrimester abortion include surgery (hysterotomy and hysterectomy), injection of drugs either intraamniotically or extraovulary, and mechanical stimulation. The most significant of these methods is the intraamniotic injection of prostaglandin. Dr. Anderson, Chief of Obstetrics at Yale University, testified that he knew of no known deaths associated with prostaglandins as of the date of trial (Tr. 323). Only Dr. Kerenyi would not say that prostaglandin is safer than saline amniocentesis (Tr. 93). All of the other medical witnesses, including both of the individual plaintiff-physicians, agreed that prostaglandin was safer (Dr. Warren, Tr. 56; Dr. Klaus, Tr. 274; Dr. Anderson, Tr. 327-328; Dr. Freiman, Tr. 368; Dr. Hall, Tr. 369-370).

Dr. Freiman stated in his deposition, portions of which were introduced into evidence at trial, that "the risk of prostaglandin is thought to be even less than the risk of saline amniocentesis" (Tr. 368). Similarly, Dr. Hall admitted that prostaglandin was developed in order to avoid the complications inherent with the use of saline (Tr. 369-370). Dr. Anderson's endorsement of prostaglandin was so strong that he suggested physicians should be liable for malpractice if they chose saline over prostaglandin after having been given all the facts on both methods (Tr. 336). It appears that prostaglandins has only been in use for about five years, compared with over ten years of experience with saline (Dr. Kerenyi, Tr. 94). However, the use of all abortion procedures was extremely limited until passage of the abortion reform law in the State of New York four years ago (Dr. Kerenyi, Tr. 94).

Nor is prostaglandin the exclusive alternative to saline amniocentesis. The mechanical means of inducing abortion are also less dangerous (Dr. Klaus, Tr. 274).

Testimony as to the legislative history of House Bill 1211 disclosed that the Missouri General Assembly based its conclu-

sion as to the dangers of saline on extensive medical evidence. Representative O'Toole, one of the sponsors of the bill, testified that numerous medical publications on abortion procedures were made available to the legislature, including defendants' Exhibits W, Y, Z, AA, M, BB, CC, DD, J and K (Tr. 186-191), and that there was extended discussion in both the House and Senate as to the relative merits of tne various procedures (Tr. 182-183). The conclusion of the Missouri General Assembly is adequately supported by the record. The proscription against use of saline amniocentesis is reasonably related to maternal health and is, therefore, within the power of the legislature.

Sections 10 and 11: Sections 10 and 11 pertain to the maintenance of abortion records. The acquisition of data is essential to the advancement of medical knowledge. These provisions establish reporting procedures for statistical purposes only, and require that the division of health ensure the confidentiality of all information. Nothing in these sections would serve to restrict either the abortion decision itself or the exercise of medical judgment in performing an abortion.

This memorandum opinion is adopted by the Court as its findings of fact and conclusions of law, and the clerk of the court will prepare and enter the proper judgment to the effect that Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11 of House Bill 1211 are constitutional, and that Section 6(1) of House Bill 1211 is unconstitutional and defendants are enjoined from enforcing Section 6(1) of House Bill 1211.

ROY W. HARPER
U. S. Senior District Judge

H. KENNETH WANGELIN
U. S. District Judge

Webster, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority opinion upholding the constitutional validity of Section 2(2)[1] (defining "viability"), Section 3(2) (requiring the woman's written consent to an abortion), Section 10 (maintenance of records) and Section 11 (retention of records). I concur in the majority opinion holding that Section 6(1) (standard of care) is unconstitutionally overbroad. I dissent from the majority opinion upholding the constitutionality of Section 3(3) (requiring spousal consent), Section 3(4) (requiring parental consent where the woman is unmarried and under the age of 18 years), Section 7 (terminating parental rights if child is born alive) and Section 9 (prohibiting use of the saline amniocentesis method of abortion).

Pregnant Woman's Consent

I join in the views expressed by the majority upholding Section 3(2), and I add one further reason in support of its validity. The state has been told it may have no part in the abortion decision during the first trimester—that this is a decision to be left to the medical judgment of the pregnant woman's attending physician "in consultation with his patient." *Roe* v. *Wade*, 410 U.S. 113, 163 (1973). The requirement of Section 3(2) that a woman evidence her consent in writing is not burdensome or chilling, but instead manifests a legitimate interest of the state that this important decision has in fact been made by the person constitutionally empowered to do so. The evidence at trial supports the conclusion that, as presently practiced, the abortion decision may not always be made in the one-on-one deliberative manner contemplated by the Supreme Court.[2] Professor Tribe

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[1] All section references in this paragraph are to Missouri House Bill 1211, enacted into law June 14, 1974.

[2] Judith Widdicombe, Executive Director of Reproductive Health Services, Inc., a not-for-profit corporation, testified with respect to the customary procedure followed by the agency. The patient is

has interpreted *Roe* not as a precedent in favor of abortion over continued pregnancy but instead as "a decision about *who should make judgments of that sort*." Tribe, *Foreward: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 11 (1973). The requirement of written consent, as framed by Section 3(2), reinforces the locus of that authority and in no way interposes the state or third parties in the decision-making process. Any regulations adopted pursuant thereto will of course be subject to judicial scrutiny, but only the statute is before us at this time.

Spousal Consent

Section 3(3) requires the consent of the spouse of a married woman seeking an abortion prior to the end of the first 12 weeks of pregnancy. Strong as is the state's interest in protecting the "regularity and integrity of the marriage relation," I cannot agree that such interest permits the state to delegate to a spouse a veto

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first requested to see her own doctor and verify the fact of pregnancy and expected term. Thereafter, she is invited to come in for counseling. Reproductive Health Services has 87 associated counselors, including clergymen, nurses and psychologists. Various options are explained to the patient, including the possibility of adoption and medical and economic support sources during the period of pregnancy. If the patient elects to terminate pregnancy and fulfills certain guidelines, a doctor is chosen from a scheduling roster. The doctor performs an average of 8 abortions in a 3½ hour session. After the abortion the patient is told to see her private physician. The agency makes a one-month and one-year post-termination follow-up for evaluation purposes. Consents were routinely required.

Planned Parenthood of Central Missouri utilizes a number of counselors, including social workers, none of whom are physicians. A physician sees the patient to determine whether or not she is pregnant. He apparently does not participate in the counseling process. All of the abortions are performed by the same doctor.

Dr. Thomas D. Kerenyi, Associate Professor and Director of the out-patient department of the Department of Obstetrics and Gynecology at Mount Sinai School of Medicine in New York City, testified that in the four years in which abortions have been permitted in New York, he has personally participated in between 4,000 and 5,000 abortions.

power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.

In *Roe* v. *Wade*, *supra*, the Supreme Court recognized that after the first trimester of pregnancy "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." 410 U.S. at 163. In the very next breath, however, it said:

> This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

In contrast to the requirement of Section 3(2) that the woman manifest her own consent in writing, which imposes no restriction on the decision-making process, Section 3(3) places an impermissible condition upon the fundamental right of a woman to elect an abortion during the first trimester, and it thus runs afoul of the *Roe* mandate against interference, quoted *supra*. Research has disclosed no other court which has held otherwise. *See Coe* v. *Gerstein*, 376 F. Supp. 695 (S.D. Fla. 1973), *appeal dismissed, cert. denied per curiam*, 417 U.S. 279 (1974); *Doe* v. *Rampton*, 366 F. Supp. 189 (D. Utah 1973); *Doe* v. *Doe*, — Mass. —, 314 N.E.2d 128 (1974); *Jones* v. *Smith*, 278 So.2d 339 (Fla. Ct. App. 1973), *cert. denied* 415 U.S. 958 (1974).

The marital union is not exalted above the individual in the constitutional scheme. As the Supreme Court said:

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the

right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) (emphasis in original).

In *Roe* v. *Wade*, *supra*, the Supreme Court expressly declined to consider the collateral rights of a spouse which might flow from a woman's decision to have an abortion during the first trimester.[3] 410 U.S. at 165, n. 67. I see no need to speculate upon such rights in this case. It is clear to me that whatever his civil claims against the doctor, the hospital or even his wife, the state may not regulate to protect the interests of the husband if it interferes in any significant way with the woman's right to have the abortion. Section 3(3) can have no other effect.[4]

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[3] The Supreme Judicial Court of Massachusetts made the distinction clear in this way:

> Nothing we say here is intended to affirm or deny a right in the husband to divorce, separation, child custody, or the like by reason of an abortion procured by his wife without his consent. We are deeply conscious of the husband's interest in the abortion decision, at least while the parties are living together in harmony. Surely that interest is legitimate. Surely, if the family life is to prosper, he should participate with his wife in the decision. But it does not follow that he must have an absolute veto, or that his veto, reasoned or unreasoned, can be enforced by the Commonwealth. *Doe* v. *Doe*, — Mass. —, 314 N.E.2d 128, 133 (1974).

[4] At trial, Dr. James C. Warren, Chairman of the Department of Obstetrics and Gynecology at Washington University School of Medicine and a member of the staff of Barnes Hospital, testified that since June 15, 1974, he had received requests for abortions from married women, some of whom could not obtain spousal consent and some of whom would not obtain spousal consent; all of the women who did not obtain such consent were refused abortions because of Section 3(3). Judith Widdicombe, Executive Director of Reproductive Health Services, Inc., testified that from June 15, 1974, through July 22, 1974, as a direct result of Section 3(3), her organization had refused abortion services to 22 women who would not obtain spousal consent and to 38 women who could not obtain such consent.

Parental Consent

Section 3(4) is constitutionally infirm for the same reasons as is Section 3(3), but additional comment is required. It is suggested that the Supreme Court did not intend to emancipate females under the age of 18 and also that *Roe* and *Doe* should not be read so as to permit minor children to be alienated from proper parental supervision. The short constitutional answer is that the Fourteenth Amendment does not differentiate between adults and minors, and such distinctions have been repeatedly rejected. *See In re Gault*, 387 U.S. 1, 13 (1967). *See also In re Winship*, 397 U.S. 358 (1970); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1968).

But this is not the whole answer, for the Supreme Court has held that even where constitutional rights are at stake, a state may impose more stringent regulations on the activities of children than it may adopt with respect to adults. *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944). Yet, I do not suppose it could be seriously argued that a minor child could be made to submit to an abortion at the insistence of her parents. *In re Smith*, 16 Md. App. 209, 295 A.2d 238 (1972). I cannot see why she would not be entitled to the same right of self-determination now explicitly accorded to adult women, provided she is sufficiently mature to understand the procedure and to make an intelligent assessment of her circumstances with the advice of her physician.[5] *See Ballard* v. *Anderson*, 4 Cal.3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971) (en banc); Wasserman, *Implications of the Abortion Decisions: Post Roe and Doe*

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[5] In Missouri, the right of a person under the age of twenty-one to give legal consent to examination, treatment, hospitalization, medical and surgical care for pregnancy, venereal disease and drug or substance abuse is expressly recognized. R.S.Mo. § 431.063; *see* R.S.Mo. § 431.062.

Litigation and Legislation, 74 Colum. L. Rev. 237, 245-47 (1974); Pilpel and Zuckerman, *Abortion and the Rights of Minors*, 23 Case W. Res. L. Rev. 779 (1972); *cf. Coe* v. *Gerstein, supra; Doe v. Rampton, supra.* The challenged section does not make this distinction and is thus, in my opinion, unconstitutionally overbroad in that it could interfere with protected rights within the first trimester of pregnancy of one physically and mentally competent to exercise those rights.[6]

Termination of Parental Rights

Section 7 makes an infant born alive following an attempted abortion which was not performed to save the life or health of the mother "an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred • • •." It further provides that a parent who consented to such abortion "shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to Section 211.411 [*sic*], RSMo."

This section in my view contains an incurable constitutional flaw: it is totally lacking in procedural due process. The majority opinion views this section as a compassionate effort on the part of the state to make sure that an unwanted child is never for a moment without protection, and it *assumes* that parents will be accorded the same hearing rights as are found

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[6] An additional reason for rejecting third party consents was expressed in *Wolfe* v. *Schroering*, Civil Action No. C-74-186-L(B) (W.D. Ky., Nov. 19, 1974):

> Further, as affects the interest of protecting maternal health, the broad provision as written gives power to the husband or parent to withhold consent without any reason, or without good or sufficient reason, and entirely unconnected with the pregnancy or the woman's health.
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> (Slip opinion at 9-10.)

in Section 211.441, R.S.Mo., which provides a statutory plan for terminating parental rights in other circumstances. I respectfully disagree.

First, the statutory language rebuts any inference of an intended hearing. It states that as to such live born infant the parent who consented to the abortion "shall have no parental rights or obligations *whatsoever, as if* the parental rights *had been* terminated pursuant to Section 211.411 [*sic*], RSMo." (Emphasis added.) The only interpretation which I can give to such clause is that parental rights are to be terminated upon the birth of the child as if all of the statutory procedures for termination of parental rights had already taken place. Significantly, Section 211.441, R.S.Mo., does not make a child an abandoned ward of the state prior to hearing as does this Section 7. I do not understand the state to have argued for the construction placed upon Section 7 by the majority, and I cannot accept it. It seems to me abundantly clear that the state proposes to take a live born child away from its parents, if they consented to an abortion, because in the view of the state it was "unwanted," and for this reason alone the consenting parents have forfeited all rights to such child. This posture ignores entirely the range of alternatives available and assumes that because a mother may for a variety of reasons have decided upon an abortion she would with certainty abandon the child if it should be born alive, or, more invidiously, that she thereby became unworthy to keep the child. No state has the right to make this judgment on a per se basis. *See Stanley* v. *Illinois*, 405 U.S. 645 (1972). The chilling effect of such legislation is so obvious as to require no further discussion; it clearly and explicitly exceeds regulation "reasonably related to maternal health." *Roe* v. *Wade, supra*, 410 U.S. at 164.

The Saline Procedure

Section 9 presents in many respects the most difficult section for constitutional analysis. Clearly, a state may act to prevent conduct which threatens the health of its citizens. We deal here, however, not with problems of contagion but with individual choices in medical techniques for the termination of pregnancy. After hearing considerable testimony, the Missouri Legislature determined that the technique known as saline amniocentesis was "deleterious to maternal health" and therefore prohibited its use after the first twelve weeks of pregnancy. The exclusion of the first twelve weeks is explained as avoidance of the regulation during the first trimester of pregnancy, as required by *Roe;* as a practical matter the saline process has not been used by physicians during the first trimester.

Judge Harper has summarized most of the significant medical testimony with respect to the saline procedure and available alternatives, as well as the mortality risks, counter-indications and side effects of each, and I need not repeat them here. The question, it seems to me, is whether the state has demonstrated a sufficiently compelling interest in maternal health to justify interfering, in a legislative way, with "the right of the physician to administer medical treatment according to his professional judgment," *Roe* v. *Wade*, 410 U.S. at 165, and whether in this instance, the legislation has been "*narrowly drawn* to express only the legitimate state interests at stake." *Roe* v. *Wade*, 410 U.S. at 155 (emphasis added).

It is conceded that prior to the enactment of this statute a statute mandating the application of a prophylactic solution to the eyes of newly born infants was the only known attempt by the Missouri Legislature to interfere with medical judgment in

maternity cases.[7] Section 9 outlaws in Missouri a procedure now employed throughout the United States in approximately seventy-five per cent of all second and third trimester abortions. That fact alone should have given the legislature some pause. It is undisputed in the testimony in this case that the mortality rate from use of saline is less than in childbirth. It is also significantly safer than two alternative procedures—hysterotomy and hysterectomy—yet neither of these surgical procedures were proscribed.[8]

Saline has been in use for over ten years. The main thrust of the state's argument is that a newer process known as prostaglandin is safer than saline. That may well be, although the drug has only been available on a non-experimental basis for slightly more than one year.[9] It is not now readily available. It too has counter-indications—for persons suffering from glaucoma and asthma. Dr. Anderson, one of the state's chief witnesses, and an ardent advocate of the prostaglandin method, refused to characterize the saline procedure as unsafe. It is thus not unfair to conclude that the only thing that Section 9 accomplishes is the proscription of a procedure now utilized by physicians in seventy-five per cent of all second and third trimester abortions even though less safe methods are still permitted and the legislatively favored method of prostaglandin is not readily available. I cannot agree that such regulation is reasonably related to maternal health; to the contrary, this seems to be the kind of unwarranted intrusion in medical discretion which the Supreme Court has held infringes upon the pa-

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[7] R.S. Mo. § 210.070.

[8] Mortality figures for the surgical procedures indicate a death rate of approximately 200 per 100,000 compared with 15 per 100,000 using saline.

[9] Dr. Warren, Chairman of the Department of Obstetrics and Gynecology at Washington University School of Medicine, testifying for the plaintiffs, said that there is at the present time no reason to believe that the mortality rate with prostaglandin is less than that with saline. [Tr. 42].

tient's constitutional rights.[10] *See Word* v. *Poelker*, 495 F.2d 1349 (8th Cir. 1974).[11]

/s/ WILLIAM H. WEBSTER
United States Circuit Judge

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[10] It may be argued that the State's compelling interest in potential human life justifies the proscription of the use of saline, since this process is more likely than other processes to result in the death of the fetus. Thus a persuasive argument can be made that the power to proscribe abortions includes the power to prohibit a means of abortion deemed most lethal to the fetus. We cannot reach this argument here, however; first, it has not been briefed or fully urged upon us, and second, it could only apply in the period following viability, *Roe* v. *Wade*, *supra*, 410 U.S. at 163, whereas Section 9 applies both to the second and third trimesters. If in the course of time prostaglandin proves to be a safer, more efficacious and more readily available medical procedure than saline, I have no doubt that it will become the procedure predominately in use in second and third trimester abortions. But this process should take place in the customary way, through research and experience, and not under criminal sanctions imposed by a single legislature. The mother is likewise protected against an individual practitioner "who abuses the privilege of exercising proper medical judgment [by] the usual remedies, judicial and inter-professional • • •." *Roe* v. *Wade*, *supra*, 410 U.S. at 166.

[11] Noting that there were no physicians in Kentucky competent in the technique of prostaglandin amnio infusion, that there were neither centers nor doctors in the area licensed to perform the procedure and that an effective and safe method of abortion should be generally available, a three-judge court, in Kentucky held a similar section invalid. *Wolfe v. Schroering*, Civil Action No. C-74-186-L (B) (W.D. Ky., Nov. 19, 1974).

In the United States District Court
Eastern District of Missouri
Eastern Division

Planned Parenthood of Central Missouri, a Missouri corporation, David Hall, M.D., and Michael Freiman, M.D., Plaintiffs, v. John C. Danforth, Attorney General of the State of Missouri, and J. Brendan Ryan, Circuit Attorney of the City of St. Louis, Missouri, Defendants.	No. 74-416C (A)

ORDER, JUDGMENT AND DECREE

In accordance with the Memorandum Opinion of the Court this day filed declaring Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11 of House Bill No. 1211 passed by the Missouri General Assembly on April 30, 1974, and signed into law on June 13, 1974 (hereinafter referred to as House Bill 1211), to be constitutional, and Section 6(1) of House Bill 1211 to be unconstitutional (Circuit Judge William H. Webster concurring in part and dissenting in part);

It is hereby Ordered, Adjudged and Decreed as follows:

1. That, with respect to Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11 of House Bill 1211, judgment be and hereby is entered in favor of defendants and against plaintiffs, and this cause as to said Sections of House Bill 1211 is dismissed with prejudice; and

2. That, with respect to Section 6(1) of House Bill 1211, judgment be and hereby is entered in favor of plaintiffs and against defendants, said Section being held to be unconstitutional and its enforcement enjoined.

/s/ WILLIAM D. RUND
Clerk
U.S. District Court

The foregoing Order, Judgment and Decree is hereby approved as to form and entered by direction of the Court this 31st day of January, 1975.

/s/ ROY W. HARPER
U.S. Senior District Judge

/s/ H. KENNETH WANGELIN
U.S. District Judge

/s/ WILLIAM H. WEBSTER
U.S. Circuit Judge

In the United States District Court
For the Eastern District of Missouri
Eastern Division

Planned Parenthood of Central Missouri, a Missouri Corporation, David Hall, M.D., and Michael Freiman, M.D., Plaintiffs, v. John C. Danforth, Attorney General of the State of Missouri, and J. Brendan Ryan, Circuit Attorney of the City of St. Louis, Missouri, Defendants.	No. 74-416C (A)

DEFENDANT JOHN C. DANFORTH'S MOTION TO ALTER OR AMEND JUDGMENT

John C. Danforth, Attorney General of the State of Missouri, one of the named defendants herein, hereby moves this Court pursuant to Rule 59(e), Federal Rules of Civil Procedure, to amend the last paragraph of its Order, Judgment and Decree entered herein on January 31, 1975, by *deleting* the second numbered paragraph thereof and by *substituting* therefor the following:

"2. That, with respect to Section 6(1) of House Bill 1211, judgment be and hereby is entered in favor of plaintiffs and against defendants with respect to the first sentence thereof said sentence being held to be unconstitutional and its enforcement enjoined and judgment be and hereby is entered in favor of defendants and against plain-

tiffs with respect to the balance of Section 6(1) and this cause as to the balance of Section 6(1) is dismissed with prejudice."

Wherefore, Defendant John C. Danforth, Attorney General of Missouri prays the Order of this Court amending or altering its Order, Judgment and Decree entered herein on January 31, 1975, in the manner stated above.

/s/ JOHN C. DANFORTH
Attorney General

/s/ D. BROOK BARTLETT
First Assistant Attorney General

/s/ KAREN M. IVERSON
Assistant Attorney General

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Attorneys for Defendant
John C. Danforth

In the United States District Court
Eastern District of Missouri
Eastern Division

Planned Parenthood of Central Missouri, a Missouri Corporation, David Hall, M.D., and Michael Freiman, M.D., Plaintiffs, vs. John C. Danforth, Attorney General of the State of Missouri, and J. Brendan Ryan, Circuit Attorney of the City of St. Louis, Missouri, Defendants.	No. 74-416C (A).

ORDER

Motion of defendant, John C. Danforth, to alter or amend judgment, OVERRULED IN ALL PARTICULARS.

/s/ WILLIAM H. WEBSTER
Circuit Judge

/s/ H. KENNETH WANGELIN
District Judge

/s/ ROY W. HARPER
Senior District Judge

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Planned Parenthood of Central Missouri, a Missouri Corporation, David Hall, M.D. and Michael Frieman, M.D., Plaintiffs, vs. John C. Danforth, Attorney General of the State of Missouri and J. Brendan Ryan, Circuit Attorney of the City of St. Louis, Missouri, Defendants.	Cause No. 74-416C (A).

NOTICE OF APPEAL

Notice is hereby given that plaintiffs, PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri corporation, DAVID HALL, M.D. and MICHAEL FREIMAN, M.D., hereby appeal to the United States Supreme Court from an "Order, Judgment and Decree" entered on the 31st day of January, 1975 holding that Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11 of "Missouri House Bill No. 1211" are constitutional and denying the request for injunctive relief against their application and enforcement.

This appeal is taken pursuant to Title 28 of the United States Code, Section 1253.

SUSMAN, SCHERMER, WILLER &
RIMMEL

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Attorneys for Plaintiffs

Supreme Court, U. S.
FILED
DEC 5 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D.,
Appellants,

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri,
Appellees.

No. 74-1419

JOHN C. DANFORTH, Attorney General of the State of Missouri,
Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

NO. 74-1151 DOCKETED MARCH 12, 1975

NO. 74-1419 DOCKETED MAY 12, 1975

PROBABLE JURISDICTION NOTED OCTOBER 6, 1975

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In the United States District Court
Eastern District of Missouri
Eastern Division

Planned Parenthood of Central Missouri, a Missouri corporation, David Hall, M.D., and Michael Freiman, M.D., Plaintiffs, v. John C. Danforth, Attorney General of the State of Missouri, and J. Brendan Ryan, Circuit Attorney of the City of St. Louis, Missouri, Defendants.	No. 74-416C(A).

CHRONOLOGICAL LIST OF RELEVANT DISTRICT COURT DOCKET ENTRIES

June 17, 1974—Complaint for Declaratory Judgment and Injunctive Relief filed. Defendant Danforth acknowledges receipt of copy of Complaint and Summons and waives service of process.

June 17, 1974—Order of Court filed. Defendants ordered to show cause, if any there be, on Monday, June 24, 1974 at 10:00 a.m. as to why injunctive relief should not be granted to plaintiffs.

June 19, 1974—Designation of three-judge District Court.

June 24, 1974—Hearing on order to show cause commenced and concluded.

June 25, 1974—Return of Summons on defendant Ryan.

July 1, 1974—Order of Court setting cause for hearing on Monday, July 22, 1974 at 10:00 a.m.

July 12, 1974—Answer of defendant Danforth filed.

July 19, 1974—Answer of defendant Ryan filed.

July 22, 1974—Trial commenced.

July 23, 1974—Trial concluded.

January 31, 1975—Memorandum Opinion and Order, Judgment and Decree.

February 5, 1975—Plaintiffs' Notice of Appeal filed.

February 7, 1975—Defendant Danforth's Motion to Alter and Amend Judgment filed.

February 12, 1975—Defendant Danforth's Motion to Alter and Amend Judgment overruled by Order of Court.

March 14, 1975—Defendant Danforth's Notice of Appeal filed.

United States District Court
Eastern District of Missouri
Eastern Division

(Title Omitted in Printing)

MEMORANDUM OPINION

The Memorandum Opinion filed January 31, 1975 by the United States District Court for the Eastern District of Missouri, Eastern Division, in Cause No. 74-416C(A) may be found in the *Jurisdictional Statement* in Cause No. 74-1151 filed on March 12, 1975 at pages A-1 through A-30, inclusive.

United States District Court
Eastern District of Missouri
Eastern Division

(Title Omitted in Printing)

ORDER, JUDGMENT AND DECREE

The Order, Judgment and Decree filed January 31, 1975 by the United States District Court for the Eastern District of Missouri, Eastern Division, in Cause No. 74-416C(A) may be found in the *Jurisdictional Statement* in Cause No. 74-1151 filed on March 12, 1975 at pages A-31 through A-32, inclusive.

United States District Court
Eastern District of Missouri
Eastern Division

(Title Omitted in Printing)

DEFENDANT JOHN C. DANFORTH'S MOTION TO ALTER OR AMEND JUDGMENT

Defendant John C. Danforth's Motion to Alter or Amend Judgment filed February 7, 1975 in the United States District Court for the Eastern District of Missouri, Eastern Division, in Cause No. 74-416C(A) may be found in the *Jurisdictional Statement* in Cause No. 74-1151 filed on March 12, 1975 at pages A-33 through A-34, inclusive.

United States District Court
Eastern District of Missouri
Eastern Division

(Title Omitted in Printing)

ORDER

The Order filed February 12, 1975 by the United States District Court for the Eastern District of Missouri, Eastern Division, in Cause No. 74-416C(A) may be found in the *Jurisdictional Statement* in Cause No. 74-1151 filed on March 12, 1975 at page A-35.

JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

April 9, 1975

Mr. Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D. C. 20543

Re: Planned Parenthood of Central Missouri, a Missouri Corporation, et al., Appellants, v. John C. Danforth, et al., Appellees, October Term, 1974, No. 74-1151

Dear Mr. Rodak:

Pursuant to Supreme Court Rule 16(3), Appellee John C. Danforth, Attorney General of Missouri, hereby declines to file any formal response to the Jurisdictional Statement because he agrees with appellants that ". . . the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution." See Supreme Court Rule 15 and Jurisdictional Statement, page 24.

Each of the questions presented by this appeal pertain to one or more sections of House Committee Substitute for House Bill No. 1211, Seventy-Seventh General Assembly, Second Regular Session, 1974. House Bill No. 1211 in its entirety and each of the challenged sections specifically represent the result of a two-year legislative effort by the Missouri General Assembly to enact legislation regulating abortion within the parameters permitted by Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973). See Section 1, House Bill No. 1211, Jurisdictional Statement, page 6.

Because most of the questions raised by this appeal relate to matters not specifically covered by Roe and Doe, because the challenged sections of House Bill 1211 reflect a

good-faith attempt by the Missouri General Assembly to regulate abortion in conformance with this Court's opinions, and because other states have enacted provisions similar in many respects to the challenged provisions of House Bill No. 1211, Appellee John C. Danforth, Attorney General of Missouri, urges this Court to note probable jurisdiction and place this case upon its docket for full review.

Very truly yours,

JOHN C. DANFORTH
Attorney General

cc: Mr. Frank Susman
Mr. J. Brendan Ryan

Supreme Court, U. S.
FILED
DEC 5 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1975

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D., Appellants,

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, Appellees.

No. 74-1419

JOHN C. DANFORTH, Attorney General of the State of Missouri, Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, Appellees.

On Appeals from the United States District Court for the Eastern District of Missouri, Eastern Division

BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1975

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D., Appellants,

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, Appellees.

No. 74-1419

JOHN C. DANFORTH, Attorney General of the State of Missouri, Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, Appellees.

On Appeals from the United States District Court for the Eastern District of Missouri, Eastern Division

BRIEF

For Planned Parenthood of Central Missouri, a Missouri Corporation, David Hall, M.D., and Michael Freiman, M.D., Appellants and Cross-Appellees

REFERENCE TO REPORTED OPINION BELOW

The January 31, 1975 "Memorandum Opinion" by the statutory three-judge panel of the United States District Court for the Eastern District of Missouri, Eastern Division, in cause num-

ber 74-416C(A) is reported as *Planned Parenthood of Central Missouri*, etc., et al. v. *Danforth*, etc., et al., at 392 F. Supp. 1362 (E.D.Mo. 1975).

STATEMENT OF JURISDICTIONAL GROUNDS

On June 17, 1974, plaintiff[1] filed their "Verified Complaint for Declaratory Judgment and Injunctive Relief," invoking federal jurisdiction: Under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution; Under United States Code, Title 28, Chapter 85, Sections 1331 and 1343; Under United States Code, Title 28, Chapter 151 (Declaratory Judgments), Sections 2201 and 2202; Under United States Code, Title 28, Chapter 155, Sections 2281 and 2284; And under United States Code, Title 42, Chapter 21, Section 1983.

Plaintiffs, a not-for-profit Missouri corporation and two practicing physicians, all engaged in providing medical and surgical procedures for the termination of pregnancy, sought to have the recently enacted "House Committee Substitute for House Bill No. 1211" declared unconstitutional on its face and to have defendants enjoined from applying or enforcing the same.

Declaratory relief was requested pursuant to 28 U.S.C., Section 2201, and a statutory three-judge panel was convened on

[1] For the convenience and facility of this Honorable Court, by agreement of the parties and due to the parties' combining both appeals within a single brief, Planned Parenthood of Central Missouri, David Hall and Michael Freiman, appellants in Cause No. 74-1151 and appellees in Cause No. 74-1419, shall hereinafter be referred to as "plaintiffs", as they were identified in the District Court proceedings. John C. Danforth, appellee in Cause No. 74-1151 and appellant in Cause No. 74-1419, and J. Brendan Ryan, appellee in Cause Nos. 74-1151 and 74-1419, shall hereinafter be referred to as "defendants," as they were identified in the District Court proceedings.

June 19, 1974 pursuant to 28 U.S.C., Sections 2281 and 2284. Trial in this cause was conducted on July 22 and 23, 1974, and on January 31, 1975, a "Memorandum Opinion" entered upholding all challenged sections of said legislation, with the sole exception of Section 6(1) which was held to be unconstitutional and its enforcement accordingly enjoined. (Jur. St. A-1). 392 F. Supp. at p. 1374. Defendant Danforth filed his "Motion to Alter or Amend Judgment" in regard to said Section 6(1) on February 6, 1975 (Jur. St. A-33 to A-34) and the same was denied by "Order" of the United States District Court on February 12, 1975. (Jur. St. A-35).

The "Order, Judgment and Decree" and accompanying "Memorandum Opinion" of the statutory three-judge panel of the United States District Court of the Eastern District of Missouri, Eastern Division, denying plaintiffs' request for declaratory judgment and injunctive relief, were entered on January 31, 1975. Plaintiffs' "Notice of Appeal" was duly filed by plaintiffs on February 5, 1975 in the United States District Court for the Eastern District of Missouri, Eastern Division. (Jur. St. A-36).

In response to plaintiffs' "Motion for Stay of Application and Enforcement of Statute, Pending Appeal to the United States Supreme Court, and Authorities in Support Thereof," filed on or about February 7, 1975, this Honorable Court granted plaintiffs' said motion under identifying number A-656 on February 18, 1975. 420 U.S. 918 (1975).

Jurisdiction of this Honorable Court to review by direct appeal the "Order, Judgment and Decree" of the United States District Court, denying to plaintiffs the permanent injunction requested, is conferred by 28 U.S.C., Section 1253.

THE CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Ninth Amendment to the Constitution of the United States:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment to the Constitution of the United States, in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

THE STATUTORY PROVISIONS INVOLVED

House Committee Substitute for House Bill No. 1211

"Section 1. It is the intention of the general assembly of the state of Missouri to reasonably regulate abortion in conformance with the decisions of the supreme court of the United States.

Section 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:

(1) 'Abortion', the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) 'Viability', that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;

(3) 'Physician', any person licensed to practice medicine in this state by the state board of registration of the healing arts.

Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment;

(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion.

(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.

(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

Section 4. No abortion performed subsequent to the first twelve weeks of pregnancy shall be performed except where the provisions of section 3 of this act are satisfied and in a hospital.

Section 5. No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.

Section 6. (1) No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended

to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo.

(2) Whoever, with intent to do so, shall take the life of a premature infant aborted alive, shall be guilty of murder of the second degree.

(3) No person shall use any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive.

Section 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411, RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.

Section 8. Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 7 of this act by the attending physician and the woman shall certify in writing that she has been so informed.

Section 9. The general assembly finds that the method or technique of abortion known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy.

Section 10. 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

2. The forms shall be provided by the state division of health.

3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

Section 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years.

Section 12. Any practitioner of medicine, surgery, or nursing, or other health personnel who shall willfully and knowingly do or assist any action made unlawful by this act shall be subject to having his license, application for license, or authority to practice his profession as a physi-

cian, surgeon, or nurse in the state of Missouri rejected or revoked by the appropriate state licensing board.

Section 13. Any physician or other person who fails to maintain the confidentiality of any records or reports required under this act is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

Section 14. Any person who contrary to the provisions of this act knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action required by this act shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

Section 15. Any person who is not a licensed physician as defined in section 2 of this act who performs or attempts to perform an abortion on another as defined in subdivision (1) of section 2 of this act, is guilty of a felony, and upon conviction, shall be imprisoned by the department of corrections for a term of not less than two years nor more than seventeen years.

Section 16. Nothing in this act shall be construed to exempt any person, firm, or corporation from civil liability for medical malpractice for negligent acts or certification under this act.

Section A. Because of the necessity for immediate state action to regulate abortions to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

Section B. If any provision of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity does not effect the provisions or ap-

plication of this Act which can be given effect without the invalid provision or application, and to this end the provisions of the Act are declared to be severable."

THE QUESTIONS PRESENTED

1. Whether "House Committee Substitute for House Bill No. 1211" (H.B. No. 1211), Section 2(2), redefining "viability" to be "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems", violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, et al. v. *Wade*, etc., 410 U.S. 113 (1973) and *Doe*, et al. v. *Bolton*, etc., et al., 410 U.S. 179 (1973)?

2. Whether H.B. No. 1211, Section 3(2), requiring various provisions as to the written consent of the patient for an abortion at all stages of pregnancy, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, supra, and *Doe*, supra?

3. Whether H.B. No. 1211, Section 3(3), requiring the written consent of a woman's spouse to an abortion at all stages of pregnancy, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, supra, and *Doe*, supra?

4. Whether H.B. No. 1211, Section 3(4), requiring the written consent of an unmarried, less than eighteen years old woman's "one parent or person in loco parentis" to an abortion at all stages of pregnancy, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, supra, and *Doe*, supra?

5. Whether H.B. No. 1211, Section 6(1), requiring physicians to exercise the same standard of care towards the fetus during the performance of an abortion, as would be exercised if the fetus were intended to be born, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, supra, and *Doe*, supra?

6. Whether H.B. No. 1211, Section 7, requiring in the event of a live birth resulting from an abortion not performed to save the life or health of the mother at all stages of pregnancy, that the parental rights of the mother and those of the father, if he consented to the abortion, shall be conclusively terminated and the child shall be an abandoned ward of the state, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, supra, and *Doe*, supra?[2]

7. Whether H.B. No. 1211, Section 9, prohibiting, after the first twelve weeks of pregnancy, the termination of pregnancy by saline amniocentesis or similar methods, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, supra, and *Doe*, supra?

8. Whether H.B. No. 1211, Sections 10 and 11, requiring the completion and maintenance by physicians of certain forms and records relating to abortion at all stages of pregnancy, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, supra, and *Doe*, supra?[2]

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[2] By agreement, the parties to these appeals have argued all questions appealed in both causes within their initial briefs, so as to simplify the presentation and discussion of the issues.

A STATEMENT OF THE CASE

Missouri "House Committee Substitute for House Bill No. 1211" was passed by the General Assembly of the State of Missouri on or about April 30, 1974, and was signed into law by the Honorable Christopher S. Bond, Governor of the State of Missouri, on June 14, 1974. The law, pursuant to Section A of the same, was effective immediately upon approval by the Governor.

On June 17, 1975, plaintiffs, a corporation operating as part of its program a medical clinic in Columbia, Missouri and serving seven rural counties, a physician and practicing obstetrician-gynecologist serving as Chairman of the Department and Professor of Obstetrics and Gynecology at the University of Missouri Medical School and a physician and practicing obstetrician and gynecologist within the St. Louis, Missouri metropolitan area, filed suit against the application and enforcement of the same. All plaintiffs within their ordinary business and practice provide abortion services for their patients. Suit was filed on behalf of all physicians similarly situated and the class consisting of plaintiffs' patients desiring to terminate their pregnancies.

Plaintiffs' requests for a temporary restraining order and for a preliminary injunction were denied. Trial was conducted on July 22 and 23, 1974 and judgment rendered on January 31, 1975. Said judgment upheld the constitutionality of H.B. No. 1211, Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11, denied permanent injunctive relief as to the same, declared Section 6(1) to be unconstitutional and issued a permanent injunction against the enforcement of same. (Jur. St. A-20). 392 F. Supp. at 1374.

The District Court upheld statutory provisions redefining viability, requiring the written certified consent of the patient,

requiring the consent of the woman's spouse if married, requiring the consent of one parent if the patient is an unmarried minor under the age of 18 years, terminating all parental rights if a live birth occurs, prohibiting the use of the saline and similar procedures and requiring the maintenance and preservation of certain medical data and records.

The District Court held unconstitutional a provision imposing a duty of care towards the fetus by a physician performing an abortion and enjoined defendants from enforcing the same.

A motion by defendant Danforth to amend the judgment as to Section 6(1) was filed on or about February 6, 1975 (Jur. St. A-33 to A-34) and denied by the District Court on February 12, 1975 (Jur. St. A-35).

Plaintiffs filed their "Notice of Appeal" herein on February 5, 1975 (Jur. St. A-36 to A-37) and defendant Danforth filed his "Notice of Appeal" herein on March 14, 1975.

Plaintiffs' motion for a stay of application and enforcement of this statute to this Honorable Court, filed on February 7, 1975, was granted on February 18, 1975. 420 U.S. 918 (1975).

Probable jurisdiction was noted by this Honorable Court as to both said appeals on October 6, 1975.

SUMMARY OF ARGUMENT

A. Section 2(2)—The Definition of Viability.

This Honorable Court in *Roe*, et al. v. *Wade*, etc., 410 U.S. 113 (1973) and *Doe*, et al. v. *Bolton*, etc., et al., 410 U.S. 179 (1973) established that viability could not be legislatively established by the states to be less than 24 weeks gestational age. Every state statute which has attempted to redefine the

"compelling point" in a manner inconsistent with this Honorable Court's holding has been declared void. *Hodgson*, et al. v. *Anderson*, etc., et al., 378 F.Supp. 1008 (D.Minn. 1974); *Doe* v. *Rampton*, etc., et al., 366 F.Supp. 189 (D. Utah 1973); *Wolfe*, et al. v. *Schroering*, etc., et al., 388 F.Supp. 631 (W.D. Ky. 1974); *etc.*

Viability must be assumed to mean the probability of meaningful survival of a particular fetus and not the mere possibility of the same; and this has been the holding of state courts involving civil actions. *Mitchell*, etc. v. *Couch*, 258 S.W.2d 901 (Ky.Ct.App. 1955); *Hall*, etc. v. *Murphy*, 236 S.C. 257 (1960), 113 S.E.2d 790; *etc.* To hold otherwise places physicians and patients in an untenable legal position, at odds with medical safety and reality.

B. **Section 3(2)—The Requirement of the Patient's Written, Certified Consent.**

This requirement violates the dictates of *Roe*, supra, and *Doe*, supra, by interfering with the abortion decision during all stages of pregnancy, imposing an extra layer of regulation and by favoring childbirth over abortion. It is contrary to the standards of *Word*, et al. v. *Poelker*, etc. et al., 495 F.2d 1349 (8th Cir. 1974). All similar requirements have been voided. *Hodgson*, supra; *Wolfe*, supra; *etc.*

C. **Section 3(3)—The Requirement of Spousal Consent.**

This requirement, although not directly confronted, was impliedly prohibited by *Roe*, supra, and *Doe*, supra. It gives to husbands the absolute right to veto arbitrarily his spouse's abortion, regardless of his participation in impregnating her. It is a power utterly void of reason or logic and would not be required by physicians, but for the statute. Its excepting clause of "necessary in order to preserve the life of the mother" is itself constitutionally defective for vagueness and for being in direct conflict with *Roe*, supra, and *Doe*, supra. Every court which has ruled on a similar provision has held the same to be unconstitutional. *Wolfe*, supra; *Poe*, et al. v. *Gerstein*, etc., et al., 517 F.2d 787 (5th Cir. 1975); *etc.* A spouse has no right to father children by any particular woman.

D. **Section 3(4)—The Requirement of Parental Consent for Unmarried Minors Under the Age of 18 Years.**

This requirement, although not directly confronted, was also impliedly prohibited by *Roe*, supra, and *Doe*, supra. Requiring parental consent serves no legitimate, reasonable nor compelling state interest. Only the pregnant minor, not her parents, bears all responsibility for the child once born. Pregnancy and childbearing is more dangerous and catastrophic to unmarried minors than it is to adults. All similar provisions have been held unconstitutional. *Doe* v. *Rampton*, etc., et al., supra; *Wolfe*, supra; *Poe*, supra; *Baird*, et al. v. *Bellotti*, etc., et al., 393 F. Supp. 847 (D.Mass. 1975) *cert. granted*, — U.S. — (1975); *etc.* Minors are entitled to constitutional guarantees (*In re Gault*, 387 U.S. 1 [1967]) and in particular analogous situations like contraception. *Population Services International*, et al. v. *Wilson*, et al., 398 F. Supp. 321 (S.D.N.Y. 1975); *etc.*

E. **Section 6(1)—The Physician's Standard of Care.**

The establishment of medical duties during an abortion, contrary to the free exercise of the right to abortion, cannot stand. The standard imposed defies the present state of medical knowledge and practice. All similar provisions have been declared void. *Hodgson*, supra; *Doe* v. *Rampton*, etc., et al., supra; *etc.*

The Section is not severable by the deletion of certain sentences. *State* ex rel. *State Board of Mediation* v. *Pigg*, 366 Mo. 798 (1951), 244 S.W.2d 75; *etc.*

F. **Section 7—The Termination of Parental Rights.**

The arbitrary termination of parental rights is totally lacking in due process and violates the basic concepts of *Stanley* v. *Illinois*, 405 U.S. 645 (1972). It denies equal protection to surviving children by a reverse discrimination favoring illegitimacy. An identical provision was voided in *Doe* v. *Rampton*, etc., et al., supra, and the reasoning on which it is based is contrary to findings reached in *Jones* v. *Smith*, et al., 278 So. 2d 339 (Fla.Ct.App. 1973), *cert. denied*, 415 U.S. 958 (1974).

G. **Section 9—The Prohibition of Saline and Similar Procedures.**

This prohibition as a practical matter would prohibit all post first trimester abortions in Missouri. It is a thinly disguised manner of preventing abortions under the veneer of preserving maternal health. It is contrary to the principles of *Roe*, supra, and *Doe*, supra, and an identical provision was voided in *Wolfe*, supra.

H. **Sections 10 and 11—Record Keeping and Reporting.**

These Sections are prohibited by *Roe*, supra, and *Doe*, supra, as to their expansive applicability to all abortions. They unduly and unwarrantedly interfere with the privacy of the medical relationship and the privacy and rights of a woman seeking an abortion. All similar regulations have been voided in *Doe* v. *Rampton*, etc., et al., supra; *Word*, supra; *Hodgson*, supra; *Friendship Medical Center, Ltd.*, et al. v. *The Chicago Board of Health*, et al., 505 F.2d 1141 (7th Cir. 1974), *cert. denied* 420 U.S. 997 (1975); *etc.*

THE QUESTION OF JURISDICTION

A. **Appeal No. 74-1151.**

Cases which sustain the jurisdiction of this Honorable Court in Appeal No. 74-1151, are: *Roe*, et al. v. *Wade*, etc., 410 U.S. 113 (1973); *Sixty-Seventh Minnesota State Senate* v. *Beens*, et al., 406 U.S. 187 (1972); *Calero-Toledo*, et al. v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *Gonzales* v. *Automatic Employees Credit Union*, et al., 419 U.S. 90 (1974); and *MTM, Inc.*, et al. v. *Baxley*, etc., et al., 420 U.S. 799, 804 (1975) in which this Honorable Court stated,

> "In light of these factors, we conclude that a direct appeal will lie to this Court under § 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below."

Clearly, this Honorable Court has jurisdiction of Appeal No. 74-1151 in which the constitutional merits of challenged Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11 were resolved adversely to plaintiffs in said cause and permanent injunctive relief denied. (Jur. St. A-20). 392 F. Supp. at 1374.

B. **Appeal No. 74-1419.**

In Appeal No. 74-1419 plaintiffs suggest that the injunctive relief granted by the District Court (Jur. St. A-20; 392 F.Supp. at 1374) as to challenged Section 6(1) was unwarrantedly and improvidently granted. As stated in *Roe*, supra,

> "We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence

to this decision that the present criminal abortion statutes of that State are unconstitutional." 410 U.S. at 166.

This position has been faithfully followed in numerous District Court cases, post *Roe*, supra, holding newly enacted state abortion statutes unconstitutional. *Doe*, et al. v. *Israel*, etc., 358 F.Supp. 1193, 1202 (D.R.I. 1973), *cert. denied*, 416 U.S. 993 (1974); *Coe*, et al. v. *Gerstein*, etc., et al., 376 F.Supp. 695, 699 (S.D.Fla. 1973), *affirmed* sub nom. *Poe*, et al. v. *Gerstein*, etc., et al., 517 F.2d 787 (5th Cir. 1975); *Hodgson*, et al. v. *Anderson*, etc., et al., 378 F.Supp. 1008, 1019 (D. Minn. 1974), *appeal dismissed* sub nom. *Spannaus*, etc. et al. v. *Hodgson*, et al., 420 U.S. 903 (1975); and *Wolfe*, et al. v. *Schroering*, etc., et al., 388 F.Supp. 631, 639 (W.D.Ky. 1974).

No evidence was presented to the District Court on which a conclusion could be drawn that the defendants would not strictly observe the declarations of the District Court or that injunctive relief was appropriate. Accordingly, if the injunctive relief granted in this appeal as to challenged Section 6(1) was inappropriate *ab initio*, this Honorable Court would not have jurisdiction under the holding in *MTM, Inc.*, set forth above, supra.

ARGUMENT

I. Introduction

A. Roe and Doe.

On January 22, 1973 this Honorable Court rendered its historic decisions recognizing the constitutional rights of women to terminate pregnancy in consultation with their physicians. *Roe*, et al. v. *Wade*, etc., 410 U.S. 113 (1973) and *Doe*, et al. v. *Bolton*, etc., et al., 410 U.S. 179 (1973).[3] The two decisions, "of course, are to be read together."[4] It is difficult to recall other decisions of modern times which have had such a profound, intimate and daily impact upon the lives of so many citizens of this country. Ironically, it was these very rights which were invidiously being denied to women of the State of Missouri by the statutory Sections herein challenged, prior to this Honorable Court's issuance of a stay.[5]

Although fallaciously accused of "judicial legislation" by many, this Honorable Court in *Roe* was explicit and exacting as to what states may and may not do to regulate abortion. This Honorable Court very early in its decision stated,

> "The state has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. . . . the State retains a definite interest in pro-

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[3] When "*Roe*" and "*Doe*" are used infra, reference shall be to the specific cases cited in the text, supra, unless different citations or cases are indicated by the context.

[4] *Roe* at 165.

[5] 420 U.S. 918 (1975).

tecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy."[6]

This Honorable Court continued,

> "As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved."
>
> . . .
>
> "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. . . ."
>
> "This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."[7]

Later, this Honorable Court repeated itself so as to make its dictates unmistakable,

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[6] *Roe* at 150.

[7] *Id.* at 159, 163.

> "To summarize and to repeat:
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> . . .
>
> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interests in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[8]

The legislation herein challenged had impermissibly intruded into the decision-making privacy of the woman and the medical province of her physician. This Honorable Court unequivocably denied to the states the right to dictate specific medical policy and procedure in the constitutionally protected area of abortion, a right the State of Missouri had blatantly usurped by enacting the legislation herein at issue.

This cause challenges the constitutionality of Missouri "House Committee Substitute for House Bill No. 1211", as passed by the General Assembly of the State of Missouri on or about April 30, 1974 and signed into law by the Honorable Christopher S. Bond, Governor of the State of Missouri, on or about June 14, 1974. Its constitutionality was questioned by Governor Bond at the very moment of the Bill's signing. Plaintiffs have maintained throughout that, pursuant to Section B, the

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[8] *Id.* at 164-165.

statute is severable. Accordingly, plaintiffs have not sought to invalidate the legislation in its entirety, but have specifically challenged the following cited portions: Section 2(2); Section 3(2); Section 3(3); Section 3(4); Section 6(1); Section 7; Section 9; Section 10; and Section 11.

B. Post Roe and Doe.

1. Legislative action—judicial reaction.

Roe and *Doe* effectively voided the then existing laws regulating abortion in every state of the union.[9] Since January 22, 1973, a flurry of legislative and administrative action has attempted to thwart and to curtail the full effect of this Honorable Court's decisions. Whenever the same have been judicially challenged, the federal courts have struck them down, regardless of their nature or ingenuity, with the singular and conspicuous exception of the District Court opinion in the present cause.

Some statutes have sought to readopt the previously existing criminal legislation with only minor differences,[10] some to restrict criminally the decision and its effecutation on the state level,[11] some to restrict criminally the operation of clinics,

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[9] On January 22, 1973, 32 states had legislation of the Texas variety, 14 had legislation of the Georgia (A.L.I.) variety and four had a variety of reform beyond the A.L.I. model. *Roe* at: 118-119 at note 2; 139 at note 35; and 140 at note 37.

[10] *E.g.*: *Doe*, et al. v. *Israel*, etc., 358 F.Supp. 1193 (D.R.I. 1973), *cert. denied*, 416 U.S. 993 (1974).

[11] *E.g.*: *Hodgson*, et al. v. *Anderson*, etc., et al., 378 F.Supp. 1008 (D.Minn. 1974), *appeal dismissed* sub nom. *Spannaus*, etc., et al. v. *Hodgson*, et al., 420 U.S. 903 (1975); and *Wolfe*, et al. v. *Schroering*, etc., et al. 388 F.Supp. 631 (W.D.Ky. 1974).

whether on the state[12] or the local level,[13] some to prohibit abortions in public hospitals[14] and some to prohibit state medicaid payments for abortions.[15]

To argue, as defendants have done below, that this legislation does not prohibit abortions is specious. While it may be true that it does not absolutely prohibit abortion, neither did the original Missouri statute adopted in 1835, as amended, and voided in *Rodgers*, et al. v. *Danforth*, etc., et al. (unreported) (W.D.Mo., No. 18360-2, May 18, 1973), *affirmed* 414 U.S. 1035 (1973). The pre-1973 statute excepted procedures necessary to preserve the patient's life. The fine line distinguishing between prohibition, restriction and regulation is oftentimes illusionary, particularly when it involves a constitutionally protected fundamental right, such as abortion.

2. Medical and demographic benefits.

The demographical and medical statistics of abortion have changed drastically since January 22, 1973. Abortion data is now "factual material of clear 'public interest' ".[16]

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[12] *E.g.*: *Hallmark Clinic*, et al. v. *North Carolina Department of Human Resources*, et al., 380 F.Supp. 1153 (E.D.N.C. 1974).

[13] *E.g.*: *Word*, et al. v. *Poelker*, etc., et al., 495 F.2d 1349 (8th Cir. 1974); and *Friendship Medical Center, Ltd.*, et al. v. *The Chicago Board of Health*, et al., 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

[14] *E.g.*: *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 (8th Cir. 1974), *cert. denied*, 419 U.S. 891 (1974); *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); and *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541 (8th Cir. 1975).

[15] *E.g.*: *Doe*, et al. v. *Beal*, etc., et al., —F.2d — (3rd Cir. 1975); *Doe*, et al. v. *Rose*, etc., 499 F.2d 1112 (10th Cir. 1974); and *Wulff*, et al. v. *Singleton*, etc., 508 F.2d 1211 (1974), *limited cert. granted*, — U.S. — (1975).

[16] *Bigelow* v. *Commonwealth of Virginia*, — U.S. — (1975).

In 1972, a total of 586,760 legal abortions were reported to the federal Center for Disease Control and a total of 615,831 were similarly reported for the year 1973.[17] It is generally conceded that the Center for Disease Control count is low because many procedures go unreported, inasmuch as such reporting is not mandatory. A more accurate and comprehensive count, although again based only on procedures voluntarily reported by cooperating facilities, indicates 745,400 for 1973 and approximately 900,000 for 1974.[18] The actual count for 1974 can safely be assumed to have exceeded 1,000,000 procedures.

Currently out of every 100 procedures in the United States: 1.5 patients were less than 15 years of age; 30.2 were between 15 and 19 years; 30.8 were between 20 and 24 years; 17.1 were between 25 and 29 years; and 17 were over 30 years of age.[19] Twenty-eight percent of the women were married and 72% were single, separated, divorced or widowed. Seventy-three percent were white and 27% were non-white.[20, 21]

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[17] *Center for Disease Control: Abortion Surveillance: 1972*, U.S. DEPT. H.E.W. (1974), at 1 and *Center for Disease Control: Abortion Surveillance: 1973*, U.S. DEPT. H.E.W. (1975), at 1.

[18] Weinstock, *et al., Legal Abortions in the United States Since the 1973 Supreme Court Decisions*, 7 FAM. PLAN. PERSP. 23 (1975).

[19] *Legalized Abortion and the Public Health*, INSTITUTE OF MEDICINE: NATIONAL ACADEMY OF SCIENCES, Washington, D.C.: 1975, at 33.

[20] *Id.* at 36, 34.

[21] Statistics compiled on 13,000 procedures performed since May 1, 1973 by Reproductive Health Services in St. Louis, Missouri, the largest volume provider of services in the state, are similar. Two percent were less than 15 years of age, 15% between 15 and 17 years, 14% between 18 and 19 years, 34% between 20 and 24 years, 17% between 25 and 29 years, ten percent between 30 and 34 years, six percent between 35 and 39 years and two percent between 40 and 44 years. Seventy percent were white, 28% black, one percent Oriental and one percent other. Twenty-five percent were married, 57% single, 13% divorced, four percent separated and one percent widowed.

The broad legalization of abortion has been reflected in other important statistical areas. Septic abortions in the municipal New York City hospitals decreased 43% from 1969 (before liberalization) to 1973 (three full years following liberalization).[22] A 60% and 70% drop were reported by New York's Kings County and Harlem Hospitals, respectively.[23] A similar decline of 68% in San Francisco[24] and 77% in Los Angeles[25] were experienced in California following liberalization. It is not surprising that the number of patient reported "spontaneous" abortions also reflected a 61% decrease.[26]

Maternal mortality rates have also been lowered. Abortion related deaths in New York fell 76% from before liberalization to the period of 1972-1974.[27] A similar drop of 63% occurred in California.[28] It should be noted that the mortality rate for abortions does not equal the rate for childbirth (using a conservatively low rate for the latter) until the 19th week of preg-

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[22] *International Inventory of Information on Induced Abortion*, INTERNATIONAL INSTITUTE FOR THE STUDY OF HUMAN REPRODUCTION, Columbia University, New York: 1974, at 642.

[23] Osofsky, *et al., The Abortion Experience*, Harper and Row, Hagerstown, Md.: 1973.

[24] Stewart, *et al., Therapeutic Abortion in California: Effects on Septic Abortion and Maternal Mortality*, 37 J. OBSTET. AND GYNECOL. 510 (1971).

[25] Seward, *et al., The Effect of Legal Abortion on the Rate of Septic Abortion at a Large County Hospital*, 115 AM. J. OBSTET. AND GYNECOL. 335 (1973).

[26] Goldstein, *et al., Trends in Therapeutic Abortion in San Francisco*, 62 AM. J. PUB. HEALTH 695 (1972). In Missouri, the statistics demonstrate a 62.5% decrease in women reporting a prior illegal abortion when comparing 1973 to 1975. (For source of information, see note 21 supra.)

[27] NATIONAL ACADEMY OF SCIENCES, supra at note 19, at 83.

[28] Goldstein, supra at note 26, at 695.

nancy gestation.[29] Compared to surgical mortality rates generally, legal abortion in the first trimester is almost twice as safe as a tonsilectomy and legal abortion in the second trimester is 29 times as safe as an appendectomy.[30]

Births of children by unmarried women have also dramatically decreased by a rate of 12% in states having enacted less restrictive abortion legislation after 1970.[31]

In addition to the myriad of reasons taken under consideration during the abortion decision-making process and previously delineated by this Honorable Court,[32] the increasing use of amniocentesis for the intra-utero determination of metabolic disorders has enabled parents to predetermine the presence of certain suspected chromosomal abnormalities. Nearly 60 such disorders are now potentially discoverable. Results of one study indicated that 64% of parents with one genetically defective child when faced with any risk greater than ten percent of having a second child similarly afflicted, elected not to repeat pregnancy.[33] The threatened effect of challenged Section 9 would negate these effects and advances of genetic counselling.

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[29] NATIONAL ACADEMY OF SCIENCES, supra at note 19, at 75. When using the maternal mortality rate for 1970 of 26.8 per 100,000 births in the United States, the most recent year for which complete statistics are available; the rate is equal to that for an abortion performed well into the third trimester. *Vital Statistics of the United States (1973)*, U.S. DEPT. H.E.W.

[30] Child, *Surgical Intervention*, LIFE AND DEATH AND MEDICINE, W. H. Freeman and Company, San Francisco: 1973, at 65.

[31] Sklar, *et al.*, *Teenage Family Formation in Postwar America*, 6 FAM. PLAN. PERSP. 80 (1974).

[32] *Roe* at 153.

[33] Carter, *et al.*, *Genetic Clinic A Follow-Up*, 1 THE LANCET 281 (1971).

3. **Public comment.**

The *United States Commission on Civil Rights* has found that,

> "State legislatures have enacted a number of anti-abortion measures, including parental or spousal consent requirements, prohibition of certain procedures, restrictive regulation of abortion clinics, and denial of Medicaid payments for abortion procedures, which tend to restrict the freedom to limit childbearing provided by Roe and Doe."[34]

The Commission's Report recommended the rejection of "anti-abortion legislation amendments" and "the repeal [of] those which have been enacted, which undermine the constitutional right to limit child-bearing."[35]

As this Honorable Court has recognized,

> "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[36]

Public opinion has dramatically changed since the removal of the illegal stigma from abortion. Public opinion polls were conducted by members of the 93rd Congress within their constituencies. Of a total of 93 polls conducted, a majority of persons responding in 73 surveys supported a woman's right to abortion.[37] Of similar import is the Harris Survey poll during the Spring of 1975 in which 54% of persons polled

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[34] *Constitutional Aspects of the Right to Limit Childbearing*, A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, Washington, D.C.: 1975, at 98.

[35] *Id.* at 101.

[36] *Stanton* v. *Stanton*, 421 U.S. 7, 14-15 (1975).

[37] *Public Opinion on Abortion Congressional Polls 93rd Congress*, NARAL, Washington, D.C.: 1974.

favored, 38% opposed and eight percent were not sure as to the legalization of first trimester abortion.[38]

The ultimate resolution of the issues in this cause will determine whether the medical, health, social welfare and other benefits which have accrued since the legalization of abortion, will be preserved and improved; or whether we shall return to the pattern of personal and legal hypocrisy, where available medical care for abortion is dependent upon one's place of residence, financial means or social standing and where a vociferous minority imposes their personal views upon all. A decisive and definitive ruling on the federal questions hereinafter raised will serve to prevent other litigation on the identical substantive issues and conserve judicial time and resources.[39]

II. The Applicable Constitutional Standards

A. First Amendment.

1. The right to give and to receive medical advice and treatment.

The present action has First Amendment implications which were not decided in *Roe* and *Doe*; namely, the right of the physician to provide medical information, followed by treatment, for his patients, and the right of the patient to receive

[38] See, HARRIS SURVEY, Louis Harris and Associates, Inc., May 26, 1975. Similarly, THE GALLUP POLL, Field Enterprises, Inc., June 8, 1975, found 21% of persons polled favoring legal abortions under any circumstances, 54% under some circumstances and 22% under no circumstances.

[39] *Law Students Civil Rights Research Council, Inc.*, et al. v. *Wadmond*, et al., 299 F.Supp. 117, 123 (S.D.N.Y. 1969) (Friendly, *J.*), *affirmed*, 401 U.S. 154 (1971).

such information and treatment, free from unwarranted state interference. Physicians have constitutional rights to practice medicine, which now include the right to advise and to perform abortions.[40, 41]

The right to give medical advice can be characterized as free expression alone,[42] or when viewed as an aspect of the physician-patient relationship, it becomes part of the freedom of association between physician and patient. The First Amendment has long been held to accord presumptive protection for the "freedom to associate and privacy in one's associations." *National Association for the Advancement of Colored People* v. *Alabama* ex rel. *Patterson*, etc., 357 U.S. 449, 462 (1958). This has been the case with the marital relationship,[43] and

[40] *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342, 1344 (8th Cir. 1974), *cert. denied*, 419 U.S. 891 (1974).

[41] "Indeed, there is language in Doe v. Bolton, supra, 410 U.S. at 194, 93 S.Ct. 739, from which it could be argued that the Court has already taken the step of extending constitutional protection to the privacy of the doctor-patient relationship." *Roe*, et al. v. *Ingraham*, etc., 480 F.2d 102, 108 at note 8 (2nd Cir. 1973).

[42] Similarly, it is an aspect of the physician's general liberty under the Fourteenth Amendment to practice his chosen profession free from unconstitutional restraint. See, *Rosen* v. *The Louisiana State Board of Medical Examiners*, 380 F.Supp. 875 (E.D. La. 1974), *affirmed* 419 U.S. 1098 (1975). See, also: *Law Students Civil Rights Research Council, Inc.*, et al. v. *Wadmond*, et al., 401 U.S. 154 (1971); *Willner* v. *Committee on Character and Fitness*, etc., 373 U.S. 96 (1963); *In re Griffiths*, 413 U.S. 717 (1973); *Greene* v. *McElroy*, et al., 360 U.S. 474 (1959); *Birnbaum* v. *Trussell*, etc., 371 F.2d 672 (2d Cir. 1966); *In re Stolar*, 401 U.S. 23 (1971); and *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971).

[43] See, *Griswold*, et al. v. *Connecticut*, 381 U.S. 479, 486 (1965), describing the marriage relationship as "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

that of attorney and client.[44] The relationship between physician and patient is no different; it promotes the fundamental purpose of maintaining the health and well-being of people.

The right to practice medicine has consistently been protected by the federal courts. In *United States* v. *Freund*, 290 Fed. 411 (D.Mont. 1923), the Court invalidated a Prohibition Act which restricted the amount of alcohol a physician could prescribe.

> "It is an extravagant and unreasonable attempt to subordinate the judgment of the attending physician to that of Congress, in respect to matters with which the former alone is competent to deal, and infringes upon the duty of the physician to prescribe in accord with his honest judgment, and upon the right of the patient to receive the benefit of the judgment of the physician of his choice."[45]

With respect to the prescription of contraceptives, moreover, physicians received considerable protection in many early cases to the point that the various Comstock acts lapsed into desuetude. See, *e.g.: United States* v. *Nicholas*, 97 F.2d 510 (2d Cir. 1938) (L. Hand, *J.*); *United States* v. *One Package*, 86 F.2d 737 (2d Cir. 1936) (A. Hand, *J.*); *Davis*, et al. v. *United States*, 62 F.2d 473 (6th Cir. 1933); *Youngs Rubber Corporation, Inc.* v. *C. I. Lee & Co., Inc.*, et al., 45 F.2d 103

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[44] See, *National Association for the Advancement of Colored People* v. *Button*, etc., et al., 371 U.S. 415 (1963); *Brotherhood of Railway Trainmen* v. *Virginia*, ex rel. *Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers of America, District 12* v. *Illinois State Bar Association*, et al., 389 U.S. 217 (1967); and *Wounded Knee Legal Defense/Offense Committee*, et al. v. *The Federal Bureau of Investigation*, et al., 507 F.2d 1281 (8th Cir. 1974).

[45] 290 Fed. at 414. Cited with approval by dissenting Judge Green in *Steinberg*, et al. v. *Brown*, etc., et al., 321 F.Supp. 741, 758 (N.D. Ohio 1970).

(2d Cir. 1930) (Swan, *J.*); and *Bours* v. *United States*, 229 Fed. 960 (7th Cir. 1915).

Many of the herein challenged Sections purport to control the physician's association with the patient by the imposition of certain acts and the requirement of certain speech within that relationship, even though the physician may not consider the same to be in the patient's best interests or to be required by standards of good medical practice.[46]

The giving of verbal medical advice and information is expression in its most pristine form. Words are certainly not conduct. The physician's expression, therefore, is surely entitled to at least the protection accorded in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) (*per curiam*), to an outdoor speech by "a leader of a Ku Klux Klan group . . ." to his followers. The very nature of the counseling and pre-surgical discussion as to medical indications, risks, advisability and the like, that a physician has with a patient considering an abortion would be impermissibly constrained by many of the herein challenged Sections. *Brandenburg*, supra, reiterated,

> "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of . . . law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447.

Accordingly, a "statute which fails to draw this distinction intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments." 395 U.S. at 448.

> "(W)hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest . . . must appear. . . ." *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968).

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[46] See, *e.g.*, challenged Sections 3(2), 3(3), 3(4), 7 and 9.

The nature of this governmental interest has been described by "a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." 391 U.S. at 376-377. (Citations omitted).

There is no significant practical distinction between totally proscribing the physician-patient decision to abort and regulating the methodology or content of that decision's dialogue. Prior to *Roe* and *Doe* at least one federal court reached the First Amendment arguments.

> "First Amendment freedoms of speech and expression are clearly involved in the present case since the very language of the statute imposes a prohibition on any person who 'prescribes or advises or directs' a woman to terminate a pregnancy."
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> . . .
>
> "We conclude that the New Jersey abortion statute . . . chills and deters the plaintiff-physicians in the exercise of protected First Amendment activities; and that it violates plaintiff-physicians' rights under the Fourteenth Amendment to freely practice the profession of their choice."[47]

As recently stated by this Honorable court,

> ". . . the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved. Cf. *Roe* v. *Wade*, 410 U.S. 113, 152-

[47] *Young Women's Christian Association of Princeton, New Jersey*, et al. v. *Kugler*, etc., 342 F.Supp. 1048, 1063, 1066 (D.N.J. 1972), *cert. denied*, 415 U.S. 989 (1974).

> 154 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479, 485-486 (1965)."[48]

Intrusion by the State into the medical decision-making process between doctor and patient relative to abortion is constitutionally impermissible during the first trimester in any form; and during the latter trimesters unless such intrusion conforms to the standards discussed infra. (See, particularly IIB1a and b at 37 and IIB2 at 40).

2. **Entanglement of church and state through political divisiveness.**

The enactment of restrictive abortion legislation subsequent to January 22, 1973, violates the Establishment and Free Exercise Clauses of the First Amendment to the Federal Constitution.

In *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664 (1970), this Honorable Court developed the third segment of the present tripartite test of the Religion Clause. The dimension of entanglement involved with governmental interference in religions autonomy was itself developed into a bipartite concept one year later in *Lemon*, et al. v. *Kurtzman*, etc., et al., 403 U.S. 602 (1971). In *Lemon*, supra, Chief Justice Burger defined an additional and unique facet of entanglement, separate and distinct from the element of church-state intermingling.

> "A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs . . . it can be assumed that state assistance will entail considerable political activity. Partisans . . . understandably concerned . . . and sincerely dedicated to both the religious and secular . . . will inevitably cham-

[48] *Paris Adult Theatre I*, et al. v. *Slayton*, etc., et al., 413 U.S. 49, 66 at note 13 (1973).

pion this cause and promote political action to achieve their goals. Those who oppose . . . whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith."

"Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. . . . We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief."[49]

The warning of *Lemon*, supra, has been repeatedly echoed. "In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration."[50]

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[49] 403 U.S. at 622-623.

[50] *Committee for Public Education & Religious Liberty*, et al. v. *Nyquist*, etc., et al., 413 U.S. 756, 797 (1973).

The schism of opinion along religious lines engendered by this Honorable Court's decisions in *Roe* and *Doe* needs not be expounded here. It has, without question, been pervasive and deep-seated.

As stated in the applicable context of state aid to parochial schools,

> "Thus, it is the funding of basically religious institutions, being successive and repetitive, which would invite seasonal controversy and confrontation between proponents and opponents of such action. The injection of the absolutes and moral imperatives implicit in the propagation of any faith would work an inevitable distortion in the spirit of compromise and the acceptability of political differences which is characteristic of our political system. It is just such an eventuality that the framers of the First Amendment sought to avoid."[51]

The effort to prohibit all abortions in America is today a religious institution. The oft-times bitter debate which has raged over the issue of abortion and abortion legislation such as at issue here, has far exceeded the emotional and philosophical depth and breadth of debate surrounding state financal assistance to parochial educational institutions.

To retreat from the full implications and substance of the prior holdings in *Roe* and *Doe* by sustaining any of the herein challenged Sections, would violate the entanglement proscription of the First Amendment through the statutory codification of a denominational religious tenet.[52]

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[51] *Public Funds for Public Schools of New Jersey*, et al. v. *Marburger*, etc., et al., 358 F.Supp. 29 (D.N.J. 1973), *affirmed*, 417 U.S. 961 (1974). See, *Meek*, et al. v. *Pittenger*, etc., et al., 421 U.S. 349 (1975).

[52] For a discussion of abortion and the Religion Clause, see Tribe, "B. The Prohibited Role of the State: Religious Entanglement", in *THE SUPREME COURT 1972 TERM Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV., at 18-32.

Religious denominations have taken sides on the issue and have felt it incumbent upon themselves to take public stances on their positions. With the exception of the Catholic Church, nearly every major religious group in the United States has officially endorsed the right of a woman to terminate a pregnancy.[53]

B. Fourteenth Amendment.

1. Right of privacy "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."[54]

The right of privacy has been vastly developed since *Union Pacific Railway Company* v. *Botsford*, 141 U.S. 250 (1891), involving the pre-trial discovery right to a medical examination of plaintiff. It would be, perhaps, more accurate to say that the right of privacy has required greater expounding by the courts in reaction to the growth of governmental regulation, than to say that the right of privacy has grown.

> "No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person . . . 'The right to one's own person may be said to be a right of complete immunity: to be let alone.' "[55]

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[53] This position has been endorsed by, among others: American Baptist Convention; American Ethical Union; American Humanist Association; American Lutheran Church; Central Conference of American Rabbis; Missouri Council of Churches; Presbyterian Church in the U.S.; Reformed Church in America; Religious Society of Friends (Quakers); Southern Baptist Convention; Union of American Hebrew Congregations; Unitarian Universalist Association; United Church of Christ; United Methodist Church and United Presbyterian Church in the U.S.A.

[54] *Roe* at 153.

[55] 141 U.S. at 251.

a. Differentiation of gestational periods.

In *Roe*[56] and *Doe*[57] this Honorable Court established various degrees of permissible state regulation of the abortion decision and its effectuation. These standards were geared to three gestational stages of pregnancy, the total period of which is normally "266-day(s)".[58]

The failure of state legislation to observe and to incorporate these restrictions have consistently been held by the federal courts to be constitutionally impermissible.[59] All of the challenged Sections in this cause fail to heed these distinctions, originally formulated by this Honorable Court as prior or subsequent to either "the end of the first trimester" or "viability".[60]

b. Equating abortion with other medical and/or surgical procedures.

This Honorable Court in *Doe* laid the initial groundwork for the principle that the medical procedure of abortion must be legislatively treated similarly to other medical and/or surgical

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[56] *Roe* at 163-165.

[57] *Doe* at 189.

[58] *Roe* at 125.

[59] *Word*, et al. v. *Poelker*, etc., et al., 495 F.2d 1349, 1351 (8th Cir. 1974); *Friendship Medical Center, Ltd.*, et al. v. *The Chicago Board of Health*, et al., 505 F.2d 1141, 1149 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *Hodgson*, et al. v. *Anderson*, etc., et al., 378 F.Supp. 1008, 1016 (D.Minn. 1974), *appeal dismissed* sub nom. *Spannaus*, etc., et al. v. *Hodgson*, et al., 420 U.S. 903 (1975); *Wolfe*, et al. v. *Schroering*, etc., et al., 388 F.Supp. 631, 636 (W.D. Ky. 1974); *Doe* v. *Rampton*, etc., et al., 366 F.Supp. 189, 192 (D.Utah 1973); and *Coe*, et al. v. *Gerstein*, etc., et al., 376 F.Supp. 695, 696-697 (S.D.Fla. 1973), *affirmed* sub nom. *Poe*, et al. v. *Gerstein*, etc., et al., 517 F.2d 787 (5th Cir. 1975).

[60] *Roe* at 163-165.

procedures of comparable risk. The history of post *Roe* and *Doe* legislation, however, has been persistently to single out the procedure of abortion for individualized statutory attention, usually of a pejorative and repressive nature.

In *Doe* this Honorable Court noted that the provisions of the Georgia law requiring Joint Commission on Accreditation of Hospitals approval,[61] hospital committee approval[62] and two-doctor concurrence[63] were not applicable to any other medical practices and stated,

> "The woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview."[64]

In the first appellate court decision dealing with newly enacted post *Roe* and *Doe* legislation the Eighth Circuit Court of Appeals held,

> "No other medical procedures or surgical operations are cited to us where the city or state regulates at the peril of criminal sanctions."
>
> . . .
>
> "Viewed another way, there is reason to strike down this ordinance. The ordinance seeks to protect interests that are already adequately protected by (1) the physician's medical judgment and professional, ethical standards and (2) the city and state health regulations which are in effect and which have application to clinical procedures in general. The extra layer of regulation which this ordinance imposes becomes unreasonably burdensome of the patients' and physicians' rights."[65]

[61] *Doe* at 193.

[62] *Id.* at 197.

[63] *Id.* at 199.

[64] *Id.* at 197.

The "extra layer of regulation" principle first enunciated in *Word*,[66] supra, has oft-times been repeated by federal courts which have voided municipal regulation of abortion clinics,[67] state regulation of abortion clinics[68] and state regulation of abortion procedures.[69]

> "By leaving the decision to those intimately involved, the Supreme Court has placed first and second stage abortions in that realm of medical judgment attendant to any health or medical procedure."[70]
>
> "The state then must treat abortions similarly to other medical procedures; it must wait until its interests as set out in *Roe* become compelling, and it must confine the regulation to only that interest."[71]
>
> "We have determined that given the 'fundamental right' status of a woman to terminate her pregnancy during the first trimester, that in no circumstances could we allow to stand regulations, purporting to promote maternal health,

[65] *Word*, et al. v. *Poelker*, etc., et al., 495 F.2d 1349, 1351 (8th Cir. 1974).

[66] *Id.*

[67] *Friendship Medical Center, Ltd.*, et al. v. *The Chicago Board of Health*, et al., 505 F.2d 1141, 1153 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

[68] *Hallmark Clinic*, et al. v. *North Carolina Department of Human Resources*, et al., 380 F.Supp. 1153, 1157 (E.D.N.C. 1974).

[69] *Hodgson*, et al. v. *Anderson*, etc., et al., 378 F.Supp. 1008, 1017 (D.Minn. 1974), *appeal dismissed* sub nom. *Spannaus*, etc., et al. v. *Hodgson*, et al., 420 U.S. 903 (1975); and *Wolfe*, et al. v. *Schroering*, etc., et al., 388 F.Supp. 631, 636 (W.D.Ky. 1974).

[70] *Hodgson*, supra at note 69, at 1017.

[71] *Wolfe*, supra at note 69, at 636.

that are more expansive than regulations that are applied to other medical procedures of the same risk and complexity."[72]

In all of the herein challenged Sections, abortion has been singled out from among the multitude of other medical and/or surgical procedures for the application of repressive and grossly encumbering strictures.

2. **The State's burden of compelling interests.**

This Honorable Court has clearly recognized that the burden of justifying the type of legislation challenged here, which infringes upon the right of a woman and her physician to terminate a pregnancy, lies heavily upon the defendants.

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.' "[73]

This principle is particularly applicable when "one's beliefs, ideas, politics, religion, cultural concerns, and the like"[74] become involved; a situation present at bar.[75]

> "Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."[76]

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[72] *Friendship Medical*, supra at note 67, at 1153.

[73] *Roe* at 155. See, *Paris Adult Theatre I*, et al. v. *Slayton*, etc., et al., 413 U.S. 49, 65 (1973).

[74] *The California Bankers Association* v. *Schultz*, etc., et al., 416 U.S. 21, 86 (1974).

[75] See, Gelinas, "Roe *v.* Wade *and* Doe *v.* Bolton: *The Compelling State Interest Test in Substantive Due Process*," 30 WASH. & LEE L.REV. 628 (1973).

[76] *O'Connor* v. *Donaldson*, — U.S. — (1975).

While this axiom of the heavy burden upon the State to justify legislative interference with the fundamental right to an abortion is capable of being succinctly stated; its importance should not be overshadowed by its brevity or clarity. The State of Missouri herein has failed to demonstrate and to prove any state interests which even approach the level of interests of a woman seeking abortion, much less state interests of a compelling magnitude or nature.

3. **Due process.**

a. **The nature of due process and for whose protection.**

To infringe upon and to restrict the freedom and liberty of women and their physicians, as to the election and/or effectuation of an abortion, by the application of any of these challenged Sections would do injustice to the Due Process Clause of the Fourteenth Amendment. The standards by which legislation must be scrutinized as to its infringing or restrictive nature are those set forth by this Honorable Court in *Roe* and *Doe*.

The Due Process requirements in the abortion context afford protection to women and to their physicians. They do not safeguard the fetus because "the word 'person', as used in the Fourteenth Amendment, does not include the unborn."[77]

b. **Certainty, definiteness and the absence of vagueness.**

Many of the challenged Sections discussed more fully, infra, are constitutionally void by reasons of uncertainty, indefiniteness and vagueness. Facially, they provide insufficient and am-

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[77] *Roe* at 158. For the abstract principle applied to a specific fetus culminating in a live birth, see *Montana* v. *Kennedy*, etc., 366 U.S. 308 (1961).

biguous warning to physicians and to women as to the legal circumstances under which a given pregnancy can be terminated. The resulting and concomitant lack of clarity is a denial of due process of law.

A vast body of case law exists on the problem of unconstitutional uncertainty.[78] This doctrine has, moreover, several complementary and competing strands. The test most frequently articulated has been that,

> "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[79]

This is partly because,

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."[80]

The constitutional standard has been held to be,

> "violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated

[78] See, generally: Todd, *Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts*, 26 STAN. L.REV. 855 (1972-1974); Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U.PA.L.REV. 67 (1960); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195 (1955); Aigler, *Legislation in Vague or General Terms*, 21 MICH.L.REV. 831 (1923); Freund, *The Use of Indefinite Terms in Statutes*, 30 YALE L.J. 437 (1921); Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77 (1948).

[79] *Connally*, etc., et al. v. *General Construction Company*, 269 U.S. 385, 391 (1926).

[80] *United States* v. *Reese*, et al., 92 U.S. 214, 221 (1875).

> conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, et al., 347 U.S. 612, 617 (1954).[81]

Clearly, "(v)ague laws in any area suffer a constitutional infirmity,"[82] be they of common law antiquity,[83] administrative[84] or criminal.[85] Furthermore, statutes challenged for vagueness which impinge upon sensitive human rights are to be more closely scrutinized. *Griswold*, supra dealt with "a right of privacy older than the Bill of Rights . . ."[86] and that right is invoked again here, as well as the right to give medical advice, which is more nearly a facet of pure freedom of speech. Thus, "(p)re-

[81] Cited with approval in *Papachristou*, et al. v. *City of Jacksonville*, 405 U.S. 156, 162 (1972).

[82] *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966) (ancient common law offense of "criminal libel" void for uncertainty).

[83] *Lanzetta*, et al. v. *New Jersey*, 306 U.S. 451, 454-55 (1939); *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, et al., 286 U.S. 210, 242-43 (1932). See, also: *United States v. Evans*, 333 U.S. 483 (1948) in which the statute had been passed in 1917; and *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), in which the statute had been passed in 1860.

As Professor Amsterdam stated in his extensive study of vagueness, "common-law terms may have no more illuminating clarity to the layman offender than the neologisms of Ronsard. . . ." Amsterdam supra at note 78, 109 U.PA. L.REV. at 84.

[84] The loyalty oath cases have virtually all involved administrative regulations. See *e.g.*: *Keyishian*, et al. v. *Board of Regents*, etc., et al., 385 U.S. 589 (1967); *Baggett*, et al. v. *Bullitt*, et al., 377 U.S. 360 (1964). See, also, *Soglin*, et al. v. *Kauffman*, etc., et al., 418 F.2d 163 (7th Cir. 1969); *In re Stolar*, 401 U.S. 23 (1971); *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971); and *Procunier*, etc., et al. v. *Martinez*, et al., 416 U.S. 396 (1974).

[85] *Lanzetta*, et al. v. *New Jersey*, 306 U.S. 451 (1939).

[86] *Griswold*, supra at note 43, at 486.

cision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[87]

"Where a statute's literal scope, unaided by a narrowing state court interpretation," may impinge upon basic fundamental rights, due process "demands a greater decree of specificity than in other contexts."[88]

In *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972) this Honorable Court formalized several standards of the "void for vagueness" doctrine.

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to ' "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.' "

The effect of such indefiniteness, uncertainty and vagueness in the present legislation will be to produce differing interpreta-

[87] *National Association for the Advancement of Colored People* v. *Button*, etc., et al., 371 U.S. 415, 438 (1963).

[88] *Smith*, etc. v. *Goguen*, 415 U.S. 566, 573 (1974).

tions from physician to physician, hospital to hospital, and city to city within the State of Missouri; as well as to impose an additional discriminatory burden upon the indigent woman, who cannot afford the luxury of shopping for a favorable and acceptable interpretation within her state's medical community.[89]

c. **Overbreadth.**

(i) **Invalid, irrebutable presumptions.**

The incorporation by many of the challenged Sections of "irrebutable presumptions", which are, in fact, refutable and whose underlying principles are baseless and unwarranted, has been frequently prohibited as a violation of due process.

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."
>
> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence

[89] For the additional burdens confronting the indigent woman in Missouri, see *Wulff*, et al. v. *Singleton*, etc., 508 F.2d 1211 (8th Cir. 1974), *limited cert. granted*, — U.S. — (1975), and *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541 (8th Cir. 1975).

and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."[90]

The prohibition against the incorporation into statutes of unwarranted presumptions has been reaffirmed in prior, related cases dealing with sexual (gender) preferences,[91] illegitimacy of children[92] and pregnancy.[93] When governmental action "rests on an irrebutable presumption often contrary to fact . . . (i)t therefore lacks critical ingredients of due process."[94] It has been suggested that such presumptions may be a parameter and/or a surrogate of equal protection, as well as of due process.[95]

A finding as to the unconstitutionality of the invalid presumptions of the challenged Sections would not be inconsistent with this Honorable Court's recent decision in *Weinberger*, etc., et al.

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[90] *Stanley* v. *Illinois*, 405 U.S. 645, 656-657 (1972).

[91] *Reed* v. *Reed*, etc., 404 U.S. 71 (1971); *Frontiero* et vir v. *Richardson*, etc., et al., 411 U.S. 677 (1973); and *Weinberger*, etc. v. *Wiesenfeld*, 420 U.S. 636 (1975).

[92] *Stanley*, supra at note 90; *Jiminez*, et al. v. *Weinberger*, etc., 417 U.S. 628 (1974); *Gomez* v. *Perez*, 409 U.S. 535 (1973); *New Jersey Welfare Rights Organization*, et al. v. *Cahill*, etc., et al., 411 U.S. 619 (1973); and *Lucas*, et al. v. *Secretary*, etc., 390 F.Supp. 1310 (D.R.I. 1975).

[93] *Cleveland Board of Education*, et al. v. *LaFleur*, et al., 414 U.S. 632 (1974); and *Andrews*, et al. v. *The Drew Municipal Separate School District*, et al., 507 F.2d 611 (5th Cir. 1975).

[94] *United States Department of Agriculture*, et al. v. *Murry*, et al., 413 U.S. 508, 514 (1973).

[95] Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L.REV. 800 (1974); and Case Comment, *Constitutional Law: Court Substitutes Conclusive Presumption Approach for Equal Protection Analysis*, 58 MINN. L. REV. 965 (1973-1974).

v. *Salfi*, et al., —U.S.—(1975). The discrimination and denial of equal protection at issue herein does operate harmfully against a "politically unpopular group", does not bear a "rational relation to a legitimate legislative goal" and cannot be justified as the "inherent imprecision of a prophylactic rule." *Id.*

(ii) **Narrowly drawn legislation.**

A second test of overbreadth is the requirement that "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake".[96] All of the challenged Sections extend far beyond this established judicial limit.

d. **Inherent bias and conflict.**

The challenged Sections provide no official means by which a physician or patient can obtain an adequate and timely administrative decision on the legality of any particular abortion. Under the challenged statutory scheme, the individual physician or a hospital committee, must decide whether a particular abortion may be legally performed. The individual physician and possibly other employees of a hospital, are subject not only to criminal prosecution but also to license revocation,[97] if they retrospectively prove incorrect in their interpretation of the Sections.[98]

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[96] *Roe* at 155; and *The California Bankers Association* v. *Schultz*, etc., et al., 416 U.S. 21, 86 (1974). See, *United States Department of Agriculture*, et al. v. *Moreno*, et al., 413 U.S. 528 (1973).

[97] Section 12. See, MO.REV.STAT., Section 334.100, subsections 1(3), (4) and (8).

[98] The possibility of such sanctions is no mirage, as was shown in California when nine physicians were brought up on disciplinary charges for performing hospital committee approved abortions in

Moreover, physicians are constrained by the legislative binds to take into account a host of factors, many arbitrary and wholly unrelated to the woman's health and personal needs. The resulting situation deprives the woman and her physician of due process of law, in that she cannot obtain an impartial consideration of her application for an abortion. This was recognized by the Supreme Court of California as an alternate ground for its decision in *The People* v. *Belous*.[99] The failure of due process herein logically follows from decisions by this Honorable Court and several appellate circuits where claims of inherent bias have been sustained, both in the criminal[100] and administrative law[101] areas. Judicial condemnation of such inherent bias, moreover, has antecedents as far back as decisions in the 1500s.[102]

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cases of German measles. See, *Shively*, et al. v. *Stewart*, 65 Cal. 2d 475 (1966), 421 P.2d 65, 55 Cal. Rptr. 217, *on remand* (No. 590333, Cal.Super.Ct., San Fran. Cty., Sept. 24, 1968) (not reported). Witness, also, the recent conviction of Dr. Kenneth Edelin in Boston, Mass. on February 15, 1975 following a six-week trial, in which first named counsel herein acted as co-counsel for defendant Edelin during trial. *Commonwealth* v. *Edelin* (Suffolk County Superior Court, No. 81823, Feb. 15, 1975) (appeal pending).

[99] 71 Cal.2d 954, 972-973 (1969), 458 P.2d 194, 206, 80 Cal. Rptr. 354, 366, *cert. denied*, 397 U.S. 915 (1970).

[100] See, *e.g.*, *Taylor* v. *Hayes*, 418 U.S. 488 (1974); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971); *Witherspoon* v. *Illinois*, et al., 391 U.S. 510 (1968) (biased jury); *In re Murchison*, et al., 349 U.S. 133 (1955); *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

[101] See, *e.g.*, *Gibson*, et al. v. *Berryhill*, et al., 411 U.S. 564 (1973) (bias of hearing board); *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, et al., 393 U.S. 145 (1968) (bias of arbitrator); *United States* ex rel. *Accardi* v. *Shaughnessy*, etc., 347 U.S. 260 (1954) (bias in deportation proceedings).

See, generally, Davis, *Administrative Law Text*, Sections 12.01-12.06, pp. 245-253 (3rd Ed. 1972); and Comment, *Prejudice and the Administrative Process*, 59 NW.U.L.REV. 216 (1964).

[102] See, *Vernon* v. *Manners*, 2 Plowd. 425, 75 Eng. Rep. 639 (K.B. 1572); and *Bonham's Case*, 8 Coke 114, 77 Eng. Rep. 646 (K.B. 1610).

The facts which illustrate unconstitutional bias here are accentuated by the vagueness of the statute, its varying interpretations from hospital to hospital and from physician to physician, and the total absence of any regularized procedure or guidelines endorsed by the State.

Put simply, the physicians in the first instance, and the hospitals later "have completely free rein to decide the law as well as the facts. . . ."[103] The former have their liberty, medical licenses and reputations to lose, if they decide in the woman's favor.[104] If the physicians are primarily concerned with their own self-interests and refuse their patients' requests they face no liability. They may even mislead the patient as to the truth of her circumstances.[105]

The system could hardly be more rigged against the woman. She and her medical advisors are forced to become adversaries because of the threat of the statute. This is a far more serious violation of due process, for example, than prior (administrative) official involvement in ascertaining the facts of a case, *Wasson* v. *Trowbridge*, etc., et al., 382 F.2d 807, 813 (2d Cir. 1967) (student disciplinary proceeding), for here the physicians have a great deal more than mere medical facts on their minds.

This grave deprivation of due process, guaranteed physicians and their patients under the Fourteenth Amendment, has been recognized in the abortion context,

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[103] *Commonwealth Coatings Corp.*, supra at note 101, at 149.

[104] For the effect and implications of the *Edelin* decision, supra at note 98, on the delivery of services, see *Doe*, et al. v. *Nassau County Medical Center*, et al., — F.Supp. — (E.D.N.Y. 1975).

[105] See, *Gleitman*, et al. v. *Cosgrove*, et al., 49 N.J. 22 (1967), 227 A.2d 689. See, also, *The State* v. *Anderson*, 298 Mo. 382, 386 (1923), 250 S.W. 68, 69, in which the patient had attempted to self-abort by use of a catheter and had informed her personal physician "that if he would not relieve her she would find some one who would; that she would rather die than go through childbirth again." Her personal physician "(i)n order to ease the woman's mind . . . told her that she was not pregnant." She consequently sought out the defendant, a physician.

"In the final analysis, plaintiff-physicians who may be threatened with prosecution under the abortion statute can rely only upon their individual judgment, always subject to a judicial determination that they guessed wrongly, and to resulting conviction and loss of license to practice medicine. As Justice Clark has observed:

> 'The increasing number of abortions subjects physicians to increased dangers of liability for incorrectly interpreting a statute. It appears that doctors face an uncertain fate when performing an abortion.' "[106]

4. **Equal protection.**

A law that selects out for treatment an identifiable class of citizens and then curtails basic rights of that class, results in both the class and the law being defined as "suspect".[107] Such laws may only be sustained by reason of an "overriding statutory purpose",[108] a "pressing public necessity"[109] or a "compelling state interest"[110] and the state must shoulder the "very heavy burden of justification".[111]

a. **Abortion as a legislatively non-favored choice.**

Closely aligned with the "extra layer of regulation" prohibition, discussed supra,[112] are the specific legislative schemes

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[106] *Young Women's Christian Association of Princeton, New Jersey*, et al. v. *Kugler, etc.*, 342 F.Supp. 1048, 1066 (D.N.J. 1972), *cert. denied*, 415 U.S. 989 (1974).

[107] *Loving*, et ux. v. *Virginia*, 388 U.S. 1, 11 (1967).

[108] *McLaughlin*, et al. v. *Florida*, 379 U.S. 184, 192 (1964).

[109] *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944).

[110] *Roe* at 155.

[111] *Loving*, supra at note 107, at 9.

[112] *See*, IIB1b, supra at 37.

which unconstitutionally favor a woman's election to carry a pregnancy to term as opposed to terminating the pregnancy.

Roe clearly held that the decision to abort was a matter of privacy encompassed within the spectrum of a fundamental right.[113] Where fundamental rights, involving abortion[114] or other forms of contraception,[115] are involved, "it is impermissible to treat differently two classes which do not differ on any ground related to the purpose of the challenged statute."[116]

The invalidity of legislation which favors childbirth over abortion has been unanimously adopted in an unbroken line of authority voiding Medicaid statutes, which exclude payment for abortion[117] and voiding public hospital policies, which exclude abortion procedures.[118]

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[113] *Roe* at 155.

[114] *Doe* at 194.

[115] *Eisenstadt*, etc. v. *Baird*, 405 U.S. 438, 453 (1972).

[116] *Friendship Medical Center, Ltd.*, et al. v. *The Chicago Board of Health, et al.*, 505 F.2d 1141, 1152 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

[117] *Klein*, et al. v. *Nassau County Medical Center*, et al., 347 F. Supp. 496 (E.D.N.Y. 1972), *affirmed* sub nom. *Ryan*, etc., v. *Klein*, et al., 412 U.S. 924 (1973); *Doe*, et al. v. *Rose*, etc., 380 F. Supp. 779 (D.Utah 1973), *affirmed*, 499 F.2d 1112 (10th Cir. 1974); *Doe* v. *Rampton*, etc., et al., 366 F.Supp. 189 (D.Utah 1973); *Doe*, et al. v. *Wohlgemuth*, et al., 376 F.Supp. 173 (W.D. Penn. 1974), *affirmed on other grounds* sub nom. *Doe*, et al. v. *Beal*, etc., et al., — F.2d — (3rd Cir. 1975); *Doe* et al. v. *Westby*, et al., — F.Supp. — (D.S.D. 1975); *Wulff*, et al. v. *Singleton*, etc., 508 F.2d 1211 (8th Cir. 1974), *limited cert. granted*, — U.S. — (1975); *Doe*, et al. v. *Myatt*, et al., — F.Supp. — (D.N.D. 1975); and *Planned Parenthood Association*, et al. v. *Fitzpatrick*, et al., — F.Supp. — (E.D. Pa. 1975).

[118] *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 (8th Cir. 1974), *cert. denied*, 419 U.S. 891 (1974); *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541 (8th Cir. 1975). See, *Doe* v. *Mundy*, et al., 514 F.2d 1179 (7th Cir. 1975).

As so aptly stated by one Court,

> "The pregnant woman may not be denied necessary medical assistance because she has made an unwarrantedly disfavored choice, and no other basis appears here for denying medical assistance."[119]

The economic "medical assistance" which formed the basis for unconstitutional discrimination by the State in *Klein*, supra, is indistinguishable from the discriminatory legislative encumbrances in the present cause. In each of the challenged Sections, the State of Missouri has preferred childbirth over abortion by encumbering in discriminatory fashion the latter.

As the Court in *Klein*, supra, went on to note,

> "Beyond that, it may well be that a still more fundamental right is infringed whenever an attempt is made by statute or rule to deny, or, as here, substantially to interfere with, the pregnant woman's interests in freely determining whether or not to bear a child."[120]

The herein challenged Sections deny to pregnant women desiring to abort the equal protection of the laws to which they are constitutionally entitled. They alone are subjected to statutory coercion to bear children, which they have no desire to bear or to raise; while women desiring to bear children are not similarly coerced. In fact, women desiring to give birth are given complete freedom to choose their favored alternative, influenced only by the multitude of individual considerations which directly and relevantly bear upon the problem, unstructured and unimpeded by state action.

The rights to use contraception[121] or to terminate a pregnancy[122] as pronounced by this Honorable Court, are neither

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[119] *Klein*, supra at note 117, at 500.

[120] *Ibid.*

[121] *Griswold*, et al. v. *Connecticut*, 381 U.S. 479 (1965); and *Eisenstadt*, etc. v. *Baird*, 405 U.S. 438 (1972).

[122] *Roe* and *Doe*.

less nor more equal than the rights to beget[123] and to raise children.[124] Parenthood or non-parenthood is a matter of individual privacy and,

> "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[125]

The state has no legitimate interest in favoring parenthood in its citizens. The State of Missouri has never advanced a legitimate reason for such a position in this cause. The three reasons advanced by the State of Texas in defense of its restrictive abortion statute, "illicit sexual conduct",[126] safe "medical procedure"[127] and "protecting prenatal life"[128] were all discounted and refuted in *Roe*.[129]

b. **The socio-economic discrimination.**

Any statutory encumbrances which restrict access to an abortion, disproportionately compound the availability of abortion for indigent women. Economically advantaged women, more readily able to afford the luxuries of private physicians, have the means and access to more favorable statutory interpretations affording compliance with and medical treatment under the challenged Sections.

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[123] *Skinner* v. *Oklahoma* ex rel. *Williamson*, etc., 316 U.S. 535 (1942).

[124] *Pierce*, etc., et al. v. *Society of Sisters*, 268 U.S. 510 (1925); and *Meyer v. State of Nebraska*, 262 U.S. 390 (1923).

[125] *Eisenstadt*, supra at note 121, at 453.

[126] *Roe* at 148.

[127] *Ibid.*

[128] *Id.* at 150.

[129] *Id.* at 148-152.

On their face, the challenged Sections make no distinction on the basis of a patient's race, economic status or social position. Yet, as applied, these and similar statutes have systematically come to deny safe medical abortions to the poor and to other minority groups. Moreover, illegal abortions and their concomitant incidents of morbidity and mortality appear to occur largely among the economically deprived sectors of our society. Several scholarly studies from the medical literature thoroughly document this discrimination.

The "Gold study"[130] covers the 1943 to 1962 period in New York City. Gold showed that from 1960-1962, for example, 55.6% of the puerperal deaths among the Puerto Rican population were due to abortion. In the same period 49.4% nonwhite puerperal deaths had the same cause, but among whites the figure was only 25.2%. In other words, well over half of the deaths associated with child-bearing of Puerto Rican women, and one-half of the same kinds of deaths of nonwhite women came from bungled abortion.[131]

Not only did Puerto Rican and nonwhite women get the worst nonmedical abortions, but they received very few of the abortions granted by hospital committees. The Gold study further revealed that white women obtained 92.7% of the hospital abortions granted in 1960 to 1962, as contrasted with 0.9% Puerto Rican and six and four-tenths percent nonwhite. Whites received $103 \frac{(92.7)}{(0.9)}$ times as many abortions as Puerto Ricans and $14.5 \frac{(92.7)}{(6.4)}$ times as many as nonwhites.[132] While no data

[130] Gold, *et al.*, *Therapeutic Abortions in New York City: A 20-Year Review*, 55 AM.J.PUB.HEALTH 964 (1965).

[131] *Id.* at 965, at Table 1.

[132] *Id.* at 966, at Table 3.

specifically on Missouri are available in the medical literature, one can infer a similar pattern from these local and nationwide studies.

Two studies of hospitals across the United States reveal the same pattern of discrimination against indigent ward patients. A 1965 study by Dr. Robert E. Hall, of 60 major American hospitals revealed that the abortion/delivery ratio for private patients was three and six-tenths times higher than that for ward patients.[133] Similarly, a 1968 study by Dr. Christopher Tietze[134] dealt with the ethnic characteristics of aborted patients and the indications for hospital therapeutic abortions at several hundred American hospitals which participate in the yearly Professional Activities Survey.[135] Thirty-four percent of the abortions counted in the survey were done for "psychiatric" indications.[136] And, "the incidence of therapeutic abortion was almost twice as high among white women as among the nonwhite group."[137]

In the two Missouri hospitals included in Hall's study, supra, St. Louis Maternity (Barnes) and The University of Missouri Medical Center at Columbia, the ratio of combined abortions to deliveries among private patients was 1:1,426 and among ward patients was 1:3,515; two and one-half times as high among the former as the latter. There is no reason to suspect that the results of studies elsewhere in the United States differ in any sig-

[133] Hall, *Therapeutic Abortion, Sterilization, and Contraception*, 91 AM.J.OBSTET. AND GYNECOL. 518, 524-525 at Table VI (1965).

[134] Tietze, *Therapeutic Abortions in the United States*, 101 AM.J. OBSTET. AND GYNECOL. 784 (1968).

[135] These hospitals numbered "269 in 1963, 321 in 1964, and 384 in 1965." *Id.* at 784.

[136] *Id.* at 785, at Table I.

[137] *Id.* at 786.

nificant manner from conditions and circumstances here in Missouri, even today, as shall appear, infra.

This discrimination, it should be noted, is not the inevitable result of unequal distribution of societal wealth. It is the product both of governmental action and inaction. Public hospitals simply do not provide the desired access to abortion on the same scale as do private institutions. Except in cases where abortion would be deemed necessary to save a patient's life, to a greater or lesser degree, the public hospital does not provide full informational, diagnostic and treatment facilities to the indigent patient.[138]

Perhaps no other factor has played so great a role in recent changes in abortion laws, as the unquestionable realization that abortion had always been freely available, virtually upon request, to those with means. Medical abortions continue, however, to be all too frequently beyond the reach of the poor, and they consequently turn to local quacks, midwives, plumbers and even worse. The result is the paradox that can be found in any large metropolitan hospital. Wealthy women enter the front door of the private hospital or facility. They receive a medical abortion under the finest of conditions. The poor woman enters the hospital through the back door, often on the verge of death. She has had a septic abortion which has caused serious infection, bleeding and, on occasion, death.[139] The hospital authorities complete this abortion and administer antibiotics, transfusions and intense care. The impoverished woman remains several days and may recover, at considerable cost to the State. The wealthy woman has paid her bill and has left after a brief stay.

[138] See, *Provisional Estimates of Abortion Need and Services in the Year Following the 1973 Supreme Court Decisions: United States, Each State and Metropolitan Area*, THE ALAN GUTTMACHER INSTITUTE, New York: 1975, at 39, at Table Y, indicating that only 15% of the nation's public hospitals were providing abortions by the first quarter of 1974.

[139] See, The St. Louis *Post Dispatch*, June 10, 1975, at 1 and 8.

State acquiescence in the hundredfold recurrence of this paradox is the cause of this socio-economic discrimination. A decision by this Honorable Court would swing open wide the front door to the impoverished woman and eliminate much of the incontrovertible discrimination complained of herein.

If the Missouri statute expressly limited the number of abortions for ward and indigent patients, or, if the rules of a particular hospital so provided, the statute on its face would be unconstitutional. It has repeatedly been said, " 'Indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color." *Edwards* v. *California*, 314 U.S. 160, 184-185 (1941) (concurring opinion of Mr. Justice Jackson). In the abortion context, however, indigency is a relevant, indeed a crucial factor. Arguably it is the only factor. All of the challenged Sections serve to thwart the poor in their access to a medical procedure—abortion—which is commonly available to those with funds and contacts.

In recent years, the Supreme Court has focused upon laws which in effect discriminate against individuals because of poverty. In *Griffin*, et al. v. *Illinois*, 351 U.S. 12 (1956), two indigent defendants could not appeal as otherwise they could have of right under Illinois law, because they could not afford a needed trial transcript. The state statute made such transcripts equally available to all who could pay the required fee. While recognizing that the Constitution does not necessarily require any appellate review, this Honorable Court held that once a state grants review, it cannot do so "in a way that discriminates against some convicted defendants on account of their poverty."[140]

The Court stated,

> "Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or in-

[140] 351 U.S. at 18.

nocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[141]

Harper, et al. v. *Virginia Board of Elections*, et al., 383 U.S. 663 (1966), a decision dealing with the poll tax, also illustrates this Honorable Court's concern with the effect of poverty upon the exercise of fundamental personal rights. In declaring the Virginia poll tax of $1.50 per person unconstitutional under the equal protection clause, this Honorable Court emphasized that the right of suffrage is a fundamental one in a free society. The State had pointed out that it exacts fees for many purposes from its citizens. In reply to this argument this Honorable Court said,

"Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored. . . . To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an 'invidious' discrimination . . . that runs afoul of the Equal Protection Clause."[142]

While *Griffin*, supra, involved the criminal process, and *Harper*, supra, the vote, plaintiffs are asserting rights of equal constitutional stature, and in an area of human behavior of equal importance. As the Supreme Court stated with reference

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[141] *Id.* at 18-19. See, also, *Douglas*, et al. v. *California*, 372 U.S. 353 (1963).

[142] 383 U.S. at 668.

to privacy in *Griswold*, supra, "(w)e deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."[143]

Equal protection concepts have matured in recent years. States are being required to take steps to remove criminal, civil and administrative inequities which are not directly the State's creation. Thus in the circumstances present in *Griffin*, supra, and *Douglas*, supra, and their progeny, the indigent were to be provided respectively with free transcripts and free appellate counsel; in *Harper*, supra, no person could be required to pay a poll tax. Indigency and financial burdens have similarly been held void when used to prevent candidacy for public office.[144]

Commentators have pointed to this emphasis "upon measures the states adopt in carrying on their activities and steps they must take to offset disabilities not of their creation,"[145] and have discussed this trend in relation to traditional equal protection theory.[146] What emerges is a requirement that the state give "attention to those inequalities for which it is not directly responsible, but which nevertheless are concomitant features of the existence of the organized state," and "adopt a standard of proportional equality which takes account of the

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[143] *Griswold*, supra at note 421, at 486.

[144] *Lubin* v. *Panish*, etc., 415 U.S. 709 (1974); and *Bullock*, et al. v. *Carter*, et al., 405 U.S. 134 (1972).

[145] Cox, *THE SUPREME COURT 1965 TERM Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV.L.REV. 91, 93 (1966).

[146] See, generally: Michelman, THE SUPREME COURT 1968 TERM Forward: *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV.L.REV. 7 (1969); Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205 (1964); and Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV.L.REV. 435 (1967).

differing needs of its citizens, whenever those needs stand in the way of equal access to the basic resources of national life."[147]

Analogously, indigents have been granted access to the courts for dissolution of their marriages,[148] marriage being a fundamental right involving privacy.[149]

While it is true that not every inequality constitutes a denial of equal protection, basic rights are involved here and under the present system the lives and the health of poor patients are drastically affected through the denial of proper medical care, free from the rigors of the State's moral strictures.

What was said by Mr. Justice White in his concurring opinion in *Griswold*, supra, is equally applicable here,

> "(T)he clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. . . . In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Skinner* v. *Oklahoma*, 316 U.S. 535 . . ."[150]

In *United States v. Vuitch*,[151] the District Court discussed this claim briefly,

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[147] *Developments in the Law Equal Protection*, 82 HARV.L. REV. 1065, 1189-1190 (1969).

[148] *Boddie*, et al. v. *Connecticut*, et al., 401 U.S. 371 (1971).

[149] *Loving*, et ux. v. *Virginia*, 388 U.S. 1 (1967).

[150] 381 U.S. at 503.

[151] 305 F.Supp. 1032 (D.D.C. 1969), *reversed on other grounds*, 402 U.S. 62 (1971).

> "National and local policy provides free medical care for the poor. It is legally proper and indeed imperative that uniform medical abortion services be provided all segments of the population, the poor as well as the rich. Principles of equal protection under our Constitution require that policies in our public hospitals be liberalized immediately."[152]

The exaggerated effect of restrictive abortion legislation upon the poor has been recognized in Medicaid cases, specifically applicable to indigents,[153] and in public hospital cases, not specifically applicable to indigents.[154]

In the instant case, as in *Griswold*, supra, and *Vuitch*, supra, the statutes in question have resulted in a discrimination against the poor. It should not matter whether or not the discrimination was the result of a conscious state policy, for the State has consciously adopted and retained abortion legislation which inexorably leads to the systematic socio-economic discrimination described. The challenged Sections should be struck down for the additional reason that they lead to unjustifiable discrimination against the poor, in violation of the equal protection clause of the Fourteenth Amendment.

III. Section 2(2)—The Definition of Viability.

Challenged Section 2(2) of the Missouri statute seeks to codify the definition of "viability" as,

> "(T)hat stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;"

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[152] *Id.* at 1035.

[153] *Wulff*, et al. v. *Singleton*, etc., 508 F.2d 1211, 1215-1216 (8th Cir. 1974), *limited cert. granted*, — U.S. — (1975).

[154] *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541 (8th Cir. 1975).

The definition becomes critical when relied upon for the subsequent application of Section 5 providing,

> "No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable."

Section 5, although facially similar to the state's limitation upon late abortion permitted by this Honorable Court after the period of viability,[155] survives or falls with the determination of Section 2(2)'s constitutionality; since it is wholly dependent upon the challenged statutory definition of "viability."

A salient distinction lies in this Honorable Court's definition of viability, variously as: "usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks;"[156] the time "the fetus then presumably has the capability of meaningful life outside the mother's womb;"[157] and when the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."[158]

Section 2(2) through its crucial reliance upon the term "indefinitely" places every physician during every pregnancy treated at the risk of complying with the requirement of Section 5 at the peril of criminal sanctions.[159] By the omission of any reference to a gestational time period, the possibility, although slight, that a fetus might be capable of surviving for an indefinite number of moments or minutes, always exists.

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[155] *Roe* at 162-164.

[156] *Id.* at 160.

[157] *Id.* at 163.

[158] *Id.* at 160.

[159] See, Section 14 and IIB3b, supra at 41.

This Honorable Court's parameters of the "compelling" point, in terms of definite weeks and "meaningful" extra-utero existence, connotes a life not measured in breaths or heartbeats. Any living fetus might well have the capability, if removed by abdominal hysterotomy, to survive for an indefinite period.[160]

While the distinction may appear subtle, it is one of great significance. A recent effort by the Minnesota legislature providing similarly that, " 'Viable' means able to live outside the womb even though artificial aid may be required" was unanimously found unconstitutional by a three-judge federal panel in *Hodgson*, et al. v. *Anderson*, etc., et al., 378 F.Supp. 1008 (D. Minn. 1974). There the Court said,

> "In its historical review of the abortion dilemma, the Supreme Court in *Roe* said:
>
> 'Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.' 410 U.S. at 160, 93 S.Ct. at 730."
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> "Even accepting the lesser of these figures, 24 weeks of pregnancy is still within the second trimester or that stage subsequent to the first trimester, but prior to viability. Using 24 weeks as the earliest point of viability places a decision to terminate pregnancy between 20 and 24 weeks in the second part of the *Roe* test. Thus at any point prior to 24 weeks and subsequent to approximately the end of the first trimester, the state may regulate only insofar as such regulations are related to maternal health."
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> "We do not accept the suggestion of the defendants that the Supreme Court's comment on viability was only

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[160] It is naturally assumed, although not definitely ascertainable, that the use of "indefinite" does not synonymously imply "infinite", requiring immortality.

dicta. It appears to this Court that after reviewing the historical, medical, and legal attitude on abortions, the Supreme Court concluded that as between cases the point of viability will vary, and whether or not the fetus is in fact viable must be left to the medical judgment of the physician. In any event, under present technology, it does not arise prior to 24 weeks. It appears that the Court made its comments on viability to prevent the very thing that has happened here, which is the attempt to set viability by legislative definition and thereby, in effect, unreasonably interfere with what the Court has determined to be a fundamental right."

"Except in the context of its right to generally regulate professional standards relating to the practice of medicine, any attempt to regulate abortion prior to viability is unconstitutional unless the regulation is for the period after the approximate end of the first trimester and is reasonably related to the woman's health. The Minnesota definition of viability as found in Section 145.411, Subd. 2 and Section 145.413, Subd. 1 of the Minnesota Statutes is unreasonable and cannot stand."[161]

In *Doe* v. *Rampton*, etc., et al., 366 F.Supp. 189 (D.Utah 1973), a unanimous three-judge federal panel held unconstitutional legislation regulating abortion on the basis of viability defined as "any reasonable possibility of survival outside its mother's womb." (Utah Code Ann., Title 76, Chapter 7, Sections 76-7-302(3) and 76-7-310). The Court stated,

> "Section 76-7-302(3) is too broad a regulation and invalid because it might apply in any trimester of pregnancy, . . ."
>
> . . .

[161] 378 F.Supp. at 1016.

> . . . "76-7-310 [is] invalid because [it] might apply in any trimester. . . ." 366 F.Supp. at 192-193.

The constitutional limitations upon the state in restricting viability prompted one federal Court to hold,

> 'Viability cannot be determined by the state; the decision is a medical one and must be left to the professional medical judgment of the woman's physician just as in any other medical procedure."[162]

A similar legislative attempt to define viability as "the capability of a fetus to live outside the mother's womb albeit with artificial aid"[163] was voided by a Pennsylvania federal panel.[164] The Court held,

> "We believe that a preponderance of the evidence supports a finding that there is not a consensus within the medical community as to the gestational age at which viability occurs. Moreover, viability as defined in the Act, without reference to gestational age, is confusing even to members of the medical profession.
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> . . .
>
> We find that the Supreme Court in *Roe* intended to set the lowest limit at which viability may be deemed to occur at the 24 week period."[165]

The Court continued by discussing the "may be" language of the Pennsylvania Act, which discussion is equally applicable to the "may be" language of this challenged Section.

[162] *Wolfe*, supra at note 59, at 637.

[163] PENN.ACT No. 209, Section 2.

[164] *Planned Parenthood Association*, supra at note 117.

[165] *Id.*, slip opinion at 24, 28.

"In addition to challenging the definition of viability as being vague, plaintiffs also challenge the right of the legislature to regulate the procedure used where the fetus 'may be viable', as evidenced by the language of Section 5(a) and enforced by Section 5(d) of the Act. *Roe* makes it abundantly clear that the compelling point at which a state in the interest of fetal life may regulate, or even prohibit, abortion is not before the 24th week of gestation of the fetus, at which point the Supreme Court recognized the fetus then presumably has the capability of meaningful life outside the mother's womb. Consequently, *Roe* recognizes only two periods concerning fetuses. The period prior to viability, when the state may not regulate in the interest of fetal life, and ~~the period~~ after viability, when it may prohibit altogether or regulate as it sees fit. The 'may be viable' provision of Section 5(a) tends to carve out a third period of time of potential viability. . . . It is clear that in carving out this new time period labeled 'may be viable' the state is regulating abortions during the second trimester, when it may lawfully do so only in the interest of maternal health. Yet the state does not claim the provision to be in the interest of maternal health, nor has it shown any connection between this provision concerning fetuses which 'may be viable' and maternal health. Clearly, the state seeks to justify this provision only as a measure in furtherance of its claimed interest in protecting potentially viable fetuses. Since this provision does not meet the requirements of *Roe*, we declare it to be unconstitutional."[166]

Similarly holding that 24 weeks is the minimum gestation for viability and that the language of this Honorable Court to that effect was not *dicta*, is *Leigh* v. *Olson*, etc. et al., 385 F. Supp. 255, 260-261 (D.N.D. 1974).

[166] *Id.*, slip opinion at 29-30.

State courts prior to *Roe* and *Doe*, variously but uniformly provided,

> "[T]he expression 'viable fetus' means the child has reached such a state of development that it can presently live outside the female body as well as within it. A fetus generally becomes a viable child between the sixth and seventh month of its existence, although there are instances of younger infants being born and surviving."[167]

It is evident that viability has been used by the courts to denote a probability of survival and not the possibility (even to the extreme of remoteness), as envisioned by the challenged Section through its incorporation of "indefinitely". The mere possibility of momentary survival is not the medical standard of viability and constitutionally cannot be the legal standard of viability.

In the most thorough and complete medical review yet compiled, Behrman and Roven[168] interpolate from available data that a fetus of 25 weeks removed from the uterus has a probability of survival, when compared to the total population of births, no better than 3.6 parts in 1,000,000.[169] This is the nature of the statistical information available to the physician at the time the medical decision to terminate pregnancy is made.

The Misssouri legislature has not and could not grant to physicians the foresight to determine the meaningful or probable survivability of any particular fetus, prior to the completion of uterine extraction or expulsion. Fetuses which experienced meaningful survival following a live birth, represented approximately

[167] *Mitchell*, etc. v. *Couch*, 285 S.W.2d 901, 905 (Ky.Ct.App. 1955). See, also: *Rainey*, et al. v. *Horn*, 221 Miss. 269, 283 (1954), 72 So.2d 434, 439-440; and *Hall*, etc. v. *Murphy*, 236 S.C. 257, 263 (1960), 113 S.E. 2d 790, 793.

[168] Behrman, *et al.*, *Report to the National Commission for the Protection of Human Subjects*, U.S. PUBLIC HEALTH SERVICE (March 1975).

[169] *Id.* at 12.

seven percent at 25 weeks gestational age, 17% at 26 weeks, 44% at 27 weeks and 50% only during the middle of the 28th week.[170] For a physician to be held accountable to the standard of possible survivability, the physician has no alternative but to allow birth in each case to occur. Such a posture is highly reminiscent of the colonial practice of proving the innocence of accused witches by their drowning.

To allow a standard of possible, evanescent survival is to provide no meaningful statutory guide. Viability, as used in this Honorable Court's decisions of *Roe* and *Doe*, must be interpreted to restrict the state's prohibition of abortion to that period of gestation, when by reasonable medical judgment, the fetus, if then born, has the probability of meaningful survival. To allow the conviction of a physician based upon the mere possibility of ephemeral extra-uterine survival, not only violates this Honorable Court's directives of *Roe* and *Doe*, but raises serious questions of criminal prosecution embodied in *Mullaney*, et al. v. *Wilbur*, — U.S. — (1975). As recently noted by a three-judge dissent within the Massachusetts Supreme Judicial Court,

> " 'There is of course no virtue in "viable" as a criterion . . . It is in any case a very unsatisfactory test. It is very difficult to prove, and is usually a matter of medical guess. Viability is a relative matter, depending not only upon the age of the fetus, but upon many other factors, such as the health of the mother.' Restatement 2d: Torts, Section 869 (Tent. Draft No. 16, April 24, 1970, p. 174)."[171]

Birth during the sixth lunar month (24-27 weeks) produces a fetus which "almost always dies shortly after birth"[172] and

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[170] *Id.*, figure 6 at 14.

[171] *Mone*, etc. v. *Greyhound Lines, Inc.*, et al., — Mass. — (1975), 331 N.E.2d 916, 923.

[172] Hellman, WILLIAMS OBSTETRICS, Appleton-Century-Crofts (1971), at 200.

birth during the seventh lunar month (28-31 weeks) produces an infant which "usually . . . succumbs, but occasionally, with expert care . . . may survive."[173]

In a recent study which received national news coverage due to its implications upon the abortion debate, Dr. Dominick P. Purpura of the *Rose F. Kennedy Center for Research in Mental Retardation and Human Development* at the Albert Einstein College of Medicine noted that "[r]elatively few preterm infants spontaneously aborted at 25 weeks g.a. survive even with the most vigorous attempts at intensive care."[174] Dr. Purpura concludes that the survival of preterm infants is substantially related to the functional status of the cerebrum.

> "3. The development of dentritic spines between 28 to 33 weeks represents a critical phase in the structural maturation of synaptic organizations in human primary visual cortex."[175]

The logical conclusion is that,

> "Unless *Roe* also circumscribes judicial inquiry into a physician's decision about whether a particular fetus is viable . . . the doctor would undoubtedly prefer to err on the side of safety by refusing to perform elective abortions past a very early gestational age to avoid the danger of a criminal prosecution."[176]

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[173] *Id.* at 202.

[174] Purpura, *Morphogenesis of Visual Cortex in the Preterm Infant*, GROWTH AND DEVELOPMENT OF THE BRAIN, Raven Press, New York: 1975, at 34.

[175] *Id.* at 46.

[176] Sendor, *Medical Responsibility for Fetal Survival Under* Roe *and* Doe, 10 HARV. CIVIL RIGHTS—CIVIL LIBERTIES L. REV. 444 (1975), 454 at note 57.

To the greatest degree possible, the sound medical judgment of the responsible physician needs to be insulated from the spectres of prosecutorial zeal and personal predilections of jurors.[177]

This challenged Section 2(2) directly interferes with the First Amendment protections afforded to physicians and patients,[178] utterly fails to distinguish between the various gestational stages as to its applicability[179] and completely ignores the protective, safeguards of "judicial and intra-professional" remedies referred to and relied upon by this Honorable Court.[180] Medical decisions are properly made when based upon anatomical and scientific facts. Medical decisions are incapable of proper determination when ill-laid upon a Procrustean bed constructed of legislatively defined facts and circumstances.

IV. Section 3(2)—The Requirement of the Patient's Written, Certified Consent.

This challenged Section 3(2) required that prior to the abortion procedure, the patient must certify in writing that she consents to the procedure and that her consent is informed, freely given and is not the result of coercion.

On its face this requirement intrudes upon the First Amendment rights of physicians and patients[181] and impermissibly applies to every stage of pregnancy.[182] Section 3(2) has singled out abortion and has statutorily impinged upon the confidential trust of the doctor-patient relationship in a manner not applicable to

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177 See, IIB3d, supra at 47.

178 See, IIA1, supra at 28.

179 See, IIB1a, supra at 37.

180 *Roe* at 166.

181 See, IIA1, supra at 28.

182 See, IIB1a, supra at 37.

any other medical or surgical procedure. By definition it injects into that relationship suspicion, concern and doubt by the inference that an uninformed, duressed or coerced consent may occur in the absence of such certification.

In *Hodgson*, supra, an unanimous three-judge panel voided a recent Minnesota statute making abortions unlawful unless,

> "(4) with the consent of the woman submitting to the abortion after a full explanation of the procedure and effect of the abortion." (MINN. STAT., Section 145.412, Subdivision 1[4]).

The Court stated,

> "To the extent these regulations apply to any abortion performed in the first trimester, they are unconstitutional. The two provisions relating to informed consent (§ 145.412, Subd. 1(4) and § 145.412, Subd. 2) are objectionable in that they single out the abortion procedure and are simply unnecessary to protect either the woman's health or the health of the unborn. . . . The decision to terminate a pregnancy if made prior to viability is one which must be left to the woman and her physician, except for the limited state involvement in the second stage. By leaving the decision to those intimately involved, the Supreme Court has placed first and second stage abortions in that realm of medical judgment attendant to any health or medical procedure. In the matter of consent, as dealt with in these two provisions, physicians and patients involved in a first or second stage abortion should not be held to any more stringent regulation than is normally placed on the practice of medicine. The abortion question in these stages must be resolved by the patient and by the physician based upon the exercise of his professional judgment. There is no reason to suspect he would do otherwise."[183]

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183 *Hodgson*, supra at note 69, at 1017.

Written consent by the woman for an abortion was similarly invalidated in *Wolfe*, supra,

> "*Section 4*. This is the written consent provision. The section provides that the woman must, in all cases, give her written consent to the abortion. This requirement fails to meet constitutional scrutiny in that it is overbroad; it intrudes into the decision-making process and includes the first trimester where the state has no compelling interest. *Roe* clearly holds that the states cannot affect the first trimester period in any way through its regulations."[184]

This challenged Section also suffers from the flaw of vagueness[185] through its use of "informed" as describing the required consent. Informed consent is "in any event . . . a medical judgment", requiring in malpractice cases expert testimony in order to present a submissible case.[186] The Section fails to specify the nature of the information required to be given by the patient before her consent may be considered informed. Does it consist of data as to the actual procedure and its methodology, as to the potential risks and attendant dangers, as to the alternatives to abortion, as to the methods and risks of such alternatives or as to what any particular jury in retrospect might consider as necessary to constitute an "informed consent"?

V. Section 3(3)—The Requirement of Spousal Consent.

This Honorable Court in *Roe* did not "discuss the father's rights, if any exist in the constitutional context, in the abortion decision"; because, the issue not being then directly presented,

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[184] *Wolfe*, supra at note 69, at 636.

[185] See, IIB3b, supra at 41.

[186] *Aiken*, etc. v. *Clary*, 396 S.W.2d 668, 675 (Mo. 1965). The concept of "informed consent" is a legal nicety, the absence of which appears not to be subject to criminal sanctions in any other phase of medical practice.

there was then no need to "decide whether provisions of this kind are constitutional."[187]

Nevertheless, plaintiffs contend here that the meaning and intent of this Honorable Court's decisions in *Roe* and *Doe* unquestionably prohibit a statutory requirement of written, spousal consent.

This challenged Section blatantly affronts the holding of *Roe* that "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."[188] It is not merely the concept of spousal consent which is void, but the state's requirement of the same, *per se*, and its cumulative effect and enforcement in application. *Shelley*, et ux. v. *Kraemer*, et ux., 334 U.S. 1 (1948), *et seq*.

Subjecting the medical decision of abortion to the approval of a married woman's spouse impermissibly intrudes into the First Amendment rights of medical advice and treatment between a physician and patient.[189] No other statute, criminal or otherwise, requires the additional consent of a spouse, or any specific, third party in regard to any other known medical or surgical procedure,[190] with the constitutionally questionable, statutory exceptions in Georgia, New Mexico and Virginia for female sterilization.[191]

The requirement of spousal consent, by the terms of this challenged Section, leaves no room for any exception to or

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[187] *Roe* at 165, at note 67.

[188] *Id*. at 163.

[189] See, IIA1, supra at 28.

[190] See, IIB1b, supra at 37.

[191] See GA. CODE ANN., Section 84-932, N. MEX. STAT. ANN., Section 12-3-43; and VA. CODE, 32-423. See to the contrary, the recent rulings cited at notes 236 and 237, infra.

compromise of the marital parties' respective positions. The absence of such consent acts as an absolute bar on an abortion sought by a married woman, unless her *life* is at stake. This occurs regardless of whether such consent has been specifically denied or otherwise not forthcoming for any of a host of possible reasons. In either case, refusal or failure of a spouse to consent is legislatively permitted to override the joint abortion decision of the patient and her physician.

The subsequent result, mandated by this challenged Section, is the ultimate supremacy of the husband's desires over those of his wife, the pregnant patient, another Jane Doe or Mary Roe. The physically absent spouse's consent cannot, of course, be solicited much less obtained; a frequent situation and a circumstance for which this Section makes no mention nor provision.

On its face, this requirement interferes with the abortion decision and its effectuation without regard to the gestational period of pregnancy because by its terms it is applicable at every stage of pregnancy.[192] It is totally unrelated to the concern of maternal health. In addition, it is arguable that spousal consent under this Section would be required for the woman's use of an intra-uterine device (IUD) or any other form of contraception which operates to prevent the implantation in the uterine wall of a previously fertilized ovum.[193]

The magnitude of interference is illustrated in part by the trial testimony of Ms. Judith Widdicombe, Executive Director of Reproductive Health Services, the prime medical facility performing abortions in St. Louis, Missouri.

She testified that during the period from enactment of the challenged statute to date of trial (June 15, 1974 through July

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[192] See, IIB1a, supra at 37.

[193] Bengston, *et al.*, *The Effect of the Lippes Loop on Human Myometrial Activity*, 98 AMER.J.OBSTET. AND GYNECOL. 957, 964 (1967).

22, 1974), her institution, as a direct result of compliance with this Section, refused abortion services to 22 women for and by reason of the fact that they *would* not obtain spousal consent and, similarly, to 38 women who *could* not obtain spousal consent.[194] A total of 60 women were denied abortions during a five-week period at one facility, alone, by this challenged Section. Similar testimony was given by Dr. James C. Warren, Chairman of the Department of Obstetrics-Gynecology at Washington University Medical School and Barnes Hospital.[195] The magnitude of the crisis herein created is self-evident.

The only expert medical witness of defendants who performed abortions, Dr. Gerald G. Anderson, Chief of Obstetrics at Yale University,[196] and plaintiffs' witnesses, Judith A. Widdicombe[197] and Dr. James C. Warren,[198] all testified that normal medical practice is not to require spousal consent for an abortion.

Defendants utterly failed to meet the imposed standard of a compelling state interest for the requirement.[199] Defendants unwarrantedly argued that compelling childbirth upon a wife desiring an abortion will somehow preserve the institution of marriage, more so than allowing an abortion over the wishes of an objecting husband. The additional strains upon the marriage of another child hardly justified defendants' irrational conclusion and the irrebutable presumption[200] upon which the challenged Section is based—that marital harmony is better preserved by forcing motherhood on an undesiring wife than by

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[194] R. 149-150.

[195] *Id.* at 12, 22-24.

[196] *Id.* at 352.

[197] *Id.* at 165.

[198] *Id.* at 22.

[199] See, IIB2, supra at 40.

[200] See, IIB3ci, supra at 45.

denying to a husband the culmination of his wife's pregnancy through birth.

This Section suffers fatally from being unconstitutionally vague as to the meaning of its sole excepting clause, "to be necessary in order to preserve the life of the mother."[201] On its face, and even more seriously when taken in connection with the other terms, "preserve" can have many meanings. Does it mean to keep alive, and if so, for how long? Or, does it mean to keep free from harm or injury? Serious injury? How serious? Or, is "preserve" a much broader notion, meaning to maintain, to protect, to safeguard and/or to enrich? The statute and prior cases are silent.[202] Again, the question would go to the lay jury, without guidelines. Both *The People* v. *Belous*[203] and *Doe*, et al. v. *Scott*, etc., et al.,[204] specifically held the word "preserve" to be constitutionally defective for vagueness in a similar context.

Black's Law Dictionary,[205] used as reference by the Missouri Supreme Court in defining terms for constitutional tests of vagueness,[206] defines preservation as "Keeping safe from harm; avoiding injury, destruction, or decay." This term "presupposes a real or existing danger."[207]

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[201] See, IIB3b, supra at 41.

[202] The same excepting clause was contained in the now voided MO.REV.STAT. Section 559.100. See, *Roe* at 118, at note 2.

[203] 71 Cal. 2d 954, 960-961 (1969), 458 P.2d 194, 198-199, 80 Cal. Rptr. 354, 358-359, *cert. denied*, 397 U.S. 915 (1970).

[204] 321 F.Supp. 1385, 1389 (N.D. Ill. 1971), *vacated and remanded* sub nom. *Hanrahan*, etc. v. *Doe*, et al., 410 U.S. 950 (1973).

[205] BLACK'S LAW DICTIONARY, 1348 (4th Ed. 1951).

[206] *State of Missouri* v. *Katz Drug Company*, 352 S.W. 2d 678, 681 (Mo. 1961).

[207] *The State* ex rel. *Pollock* v. *Becker*, etc.. 289 Mo. 660, 705 (1921), 233 S.W. 641, 649.

The first difficult term is joined by a second, "necessary". How necessary? Why necessary? Necessary to what end? The lawyer's standard dictionary states that the word "necessary",

> "must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought."[208]

As *Black's Law Dictionary* notes, the word "necessary" is intrinsically equivocal.

The word "necessity" is derived from the same root as and is synonymous with "necessary" and as such has been held by the Missouri Supreme Court to be vague and violative of constitutional standards. The Missouri Supreme Court in ruling on language in a law prohibiting Sunday Sales held,

> "In the light of the history and background of these sections, and taking judicial notice of the matters hereinabove mentioned, upon what we deem to be an objective reappraisal of our views as formerly expressed, we have concluded, and accordingly hold that the presence of the phrase 'or other articles of immediate necessity' renders the statutory scheme of Sunday closing (as embodied within the two sections here under scrutiny) so vague and indefinite that it cannot be ascertained with any reasonable degree of certainty what sales are permitted, and what sales are interdicted, thus making the statute incapable of rational enforcement, and hence void."[209]

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[208] BLACK'S LAW DICTIONARY, 1181 (4th Ed. 1951).

[209] *Fred Harvey* v. *Priest*, et al., etc., 366 S.W.2d 324, 328 (Mo. 1963).

Surely, the law[210] under consideration in *Harvey*, supra, the violation of which was a misdemeanor, punishable by fine not exceeding fifty dollars, must demand a standard of vagueness far less stringent than the statute herein challenged, the violation of which is punishable by fine and/or imprisonment and, if a physician, license revocation.[211] "Necessary" was similarly held vague in *The People* v. *Belous*, supra,[212] and *Doe*, et al. v. *Scott*, etc., et al., supra.[213]

A federal decision[214] has held the concept of "necessary" unconstitutionally vague, as has this Honorable Court.[215] A California Appellate Court has held the term "necessary" to grant absolute discretion in the one defining it[216] and an Ohio court defined "necessary" as ranging "from mere convenience to logical completeness."[217] Numerous cases have held the specific word "necessary" to be unconstitutionally vague in similar abortion statutes.[218]

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[210] MO.REV. STAT., Section 563.730 (repealed 1963).

[211] See Sections 12 and 14 of the challenged legislation.

[212] Supra at note 203.

[213] Supra at note 204.

[214] A statute which permitted only "necessary" noise was struck down for vagueness. *Phillips*, et al. v. *The Borough of Folcroft, Pennsylvania*, et al., 305 F.Supp. 766, 770-771 (E.D.Pa. 1969).

[215] *Yu Cong Eng*, et al. v. *Trinidad*, etc., et al., 271 U.S. 500 (1926) held a requirement that account books "necessary" for tax investigation purposes be kept in language other than Chinese void. "Necessary" described as a term with "great indefiniteness" (271 U.S. at 517), "a vague requirement, and one objectionable in a criminal statute." 271 U.S. at 518.

[216] *Westphal* v. *Westphal*, 122 Cal.App. 379, 382 (1932), 10 P.2d 119, 120.

[217] *City of Dayton* v. *Borchers*, 13 Ohio Misc. 273, 278 (1967), 232 N.E.2d 437, 441.

[218] See: *The People* v. *Belous*, 71 Cal.2d 954, 960-961 (1969), 458 P.2d 194, 198-199, 80 Cal.Rptr. 354, 358-359, *cert. denied*,

The challenged Section gives no indication as to which of the possible meanings of "necessary" applies, nor the factors which may permissibly be taken into account. The judge and jury are permitted to consider any factors they select.

In medicine it is the patient's entire life-setting which is to be taken into account today, not simply whether a specific physiological condition will cause or contribute to death. Largely because of this civilized progress in medicine, the wording of this Section has become obsolete as a valid medical consideration. Medicine has progressed beyond the historical triad of heart, lungs and kidneys. Life has become more than survival. It has been seen to contain a spectrum of conditions, matters of degree which contribute to the quality of life, rather than the bare fact of survival.

One of many easily conceivable examples of lack of clarity inherent in the statute is that posed by Judge Green in *Steinberg*, et al. v. *Brown*, etc., et al.

> "However, I should like to set forth what I believe to be a primary example of the vagueness of the Ohio statute: the suicidal patient.
>
> A pregnant woman informs her physician that if her pregnancy goes to term she will take her own life. Is an abortion *necessary to preserve* the life of that patient? The patient will not die from any physiological condition related to her pregnancy. Suicide is an intentional act (although, perhaps, not truly a volitional one), and the

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397 U.S. 915 (1970); *United States* v. *Vuitch*, 305 F.Supp. 1032 (D.D.C. 1969), *reversed on other grounds*, 402 U.S. 62 (1971); *Doe*, et al. v. *Scott*, etc., et al., 321 F.Supp. 1385 (N.D.Ill. 1971), *vacated and remanded* sub nom. *Hanrahan*, etc., v. *Doe*, et al., 410 U.S. 950 (1973); *State* v. *Munson* (S.D. Cir.Ct., Pennington Co., Apr. 6, 1970). See, also, the dissent of Judge Green in *Steinberg*, et al. v. *Brown*, etc., et al., 321 F.Supp. 741, 750 (N.D.Ohio, 1970).

patient may not, in fact, carry out her threat. Assuming that the physician has strong and valid reasons to believe that this patient will take her own life, does this statute tell him whether he may legally terminate the pregnancy?"[219]

The psychiatric implications of unwanted pregnancies are enormous and prompted the American Psychiatric Association[220] to resolve through their Board of Trustees on December 12-13, 1969,

"A decision to perform an abortion should be regarded as strictly a medical decision and a medical responsibility. It should be removed entirely from the jurisdiction of criminal law."

Numerous federal decisions in abortion cases issued prior to 1973 held the excepted wording to be vague. As so aptly noted by the majority in *Doe*, et al. v. *Scott*, etc., et al., supra,

"If courts cannot agree on what is the essential meaning of 'necessary for the preservation of the woman's life' and like words, we fail to see how those who may be subject to the statute's proscriptions can know what it prohibits."[221]

The Supreme Court of Florida clearly recognized the inherent danger of the phrase,

"The words 'necessary to preserve the life of such mother' become free-wheeling concepts, too easily taking on meaning from the jurors predilections or religious prejudices."[222]

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[219] *Id.* at 749.

[220] The A.P.A. is the second largest medical specialty organization in the United States, being composed of approximately 20,000 physicians who specialize as psychiatrists in the diagnosis, care and treatment of mental diseases and defects of the mind.

[221] 321 F.Supp. at 1388.

[222] *Walsingham*, et al. v. *State of Florida*, 250 So.2d 857, 862 (Fla. 1971).

It cannot be assumed that the absence of the excepting word "health" was a legislative oversight. The joint phrase "life and health" was expressly contained in Sections 5, 6(1), 6(3), 7, and A; but expressly excluded in this challenged Section and the following Section 3(4) requiring parental consent.

Neither can use of the word "life" in this context be reasonably construed to include the concept of "health"; and several courts have so held "health" not to be incorporated into the concept of "life".[223]

Lastly, in *Roe*, et al. v. *Wade*, etc., 314 F.Supp. 1217 (N.D. Tex. 1970), *affirmed*, 410 U.S. 113 (1973), a three-judge federal panel, without specifying particularly offensive words, held the entire phrase ("for the purpose of saving the life of the mother")[224] within the Texas statute to be vague and overbroad.

In affirming, this Honorable Court, while avoiding the problems of statutory vagueness,[225] clearly included the standard of "health" to be imposed upon the states as a shibboleth for permitted statutory restrictions.[226] Health in the abortion context includes the mental, psychological and emotional aspects, not merely the physiological components of health.[227] This challenged Section provides only for life saving exceptions.

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[223] *Doe*, et al. v. *Turner*, etc., et al., 361 F.Supp. 1288, 1291-1292 (S.D. Iowa 1973); *Montalvo*, et al. v. *Colon*, etc., et al., 377 F.Supp. 1332, 1344 (D.P.R. 1974); and *Rodos*, et al. v. *Michaelson*, etc., 396 F.Supp. 768, 775-776 (D.R.I. 1975).

[224] TEX. PENAL CODE, Art. 1196.

[225] *Roe* at 164.

[226] *Roe* at 164-165.

[227] *United States* v. *Vuitch*, 402 U.S. 62, 72 (1971).

This challenged Section also suffers from the defect of overbreadth.[228] The lack of spousal consent in the case of any specific pregnancy may, under the challenged Section's terms, not only be the result of a husband's refusal to accede to his wife's desire to abort. It may well include: A pregnant, married woman in the midst of dissolution of marriage proceedings; A pregnant, married woman who has been deserted by her husband shortly after conception and who has no idea as to his whereabouts; A married woman, pregnant by a man other than her husband, the latter having deserted her many years before and whose whereabouts are completely unknown to her; A married pregnant woman with severe medical contra-indications for child birth, whose husband has no concern for the risks to her health or life; And a married woman, impregnated as a result of criminal assault and rape[229] and whose husband either will not consent or for reasons of unavailability, unlocatability or otherwise cannot consent. None of these married, pregnant women could obtain an abortion without spousal consent under this challenged Section, unless the same was necessary to preserve her life; regardless of the myriad of other pressures or compelling justifications for choosing to terminate the pregnancy. In short, the wife can not obtain an abortion for any reason (unless life-saving) without her husband's consent, which can be withheld for any reason or for no reason.

In all of the above situations in which the spouse has not impregnated his wife, his lack of consent would serve to prevent an abortion from being obtained and yet he would have no legal obligations, duties or rights in regard to the resulting child following birth. He would be free to turn his back and to ignore the child's welfare. The mother, however, would continue to

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[228] There can be no serious question that plaintiffs may raise all aspects of overbreadth as to all the variegated applications of this and other challenged Sections. See *Bigelow* v. *Commonwealth of Virginia*, — U.S. — (1975).

[229] See note 234, infra.

have full legal obligations of support towards such child, including criminal sanctions[230] in case of her failure to support. Under Missouri law,[231] a marriage can be dissolved by reasons of pregnancy conceived with another prior to marriage[232] or refusal to engage in sexual intercourse.[233] Thus while extramarital pregnancy or refusal to participate in intercourse are grounds for dissolving a marriage; they are not reasons under this Section which would negate the necessity of spousal consent, contended by the State to be an aid towards marital harmony.

Pregnancy through rape is not beyond reasonable possibility, 1,342 forcible criminal rapes having occurred in Missouri during 1973.[234] A married woman impregnated as a result of rape faces the unacceptable and anomalous situation where she may be forcibly impregnated by one man and then be forced to continue such pregnancy through to childbirth by the wishes of her husband; finally bearing a child for which she will have continuing legal liability for its support while her husband has none.

The private right of reproductive and procreative activity has been held to be a right of the individual. It is not a right of the marriage relationship[235] nor is it a right of the spouse, legally

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[230] MO. REV. STAT., Section 559.353.

[231] Under the present "no-fault" dissolution law, MO. REV. STAT., Section 452.320 (1)(2)(b), acceptable grounds are that "respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent." Specific grounds for divorce under the now repealed MO. REV. STAT., Section 452.010, can be presumed to meet the now general definition of grounds for dissolution.

[232] *Needham* v. *Needham*, 299 S.W. 832, 835 (1927).

[233] *Cox* v. *Cox*, 493 S.W.2d 371, 373-374 (Mo.Ct.App. 1973).

[234] *Uniform Crime Reports for the United States, 1973*, U.S. DEPT. OF JUSTICE, at 70, at Table 4.

[235] *Eisenstadt*, etc. v. *Baird*, 405 U.S. 438, 453 (1972).

compensable if lost through the fault of another.[236] Two recent cases have recognized the right of a woman without her husband's approval to submit to surgical sterilization.[237]

Two early reported cases, an Iowa case in 1879[238] and a New York case in 1952[239] denied recovery to husbands whose wives underwent abortions without their consent.

This Section attempts to grant greater rights to spouses by reason of their marriage than granted to unmarried fathers; and yet this Honorable Court has recognized this to be an invalid distinction in the area of reproduction and procreation.[240] While this Honorable Court has held that the rights of putative fathers regarding their illegitimate children are constitutionally protected,[241] this Section discriminates on its face against such fathers in favor of spouses, who are granted a right to deny their wives an abortion, even in cases where they themselves may not have impregnated their wives; truly an anomalous situation at odds with constitutional guarantees.

When read in conjunction with challenged Section 7, the situation reverses and putative fathers receive favored treatment. Following live birth, the non-spousal or putative father, not having been forced to approve or disapprove the abortion under

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[236] *Murray* v. *Vandevander*, et al., 522 P.2d 302 (1974), in which a husband's consent for the sterilization of his wife was held not legally required nor the lack of the same compensable.

[237] *Murray, id.*, and *Ponter*, et al. v. *Ponter*, et al. (Superior Court of New Jersey, Docket No. C-3599-74, June 9, 1975).

[238] *Kansz* v. *Ryan*, et al., 51 Iowa 232 (1879), 1 N.W. 485.

[239] *Herko* v. *Uviller*, 203 Misc. 108 (1952), 114 N.Y.S. 2d 618.

[240] *Eisenstadt*, etc. v. *Baird*, 405 U.S. 438 (1972).

[241] *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

this Section 3(3), retains all rights[242] and obligations[243] in regard to the child, while the consenting spouse has relinquished all such rights and obligations. It is widely recognized that the legitimacy of the parent-child relationship is not a valid criterion in determining legal rights between them.[244]

With the exception of the District Court below, the courts have unanimously ruled that putative fathers and spouses have no common law nor constitutionally valid statutory right to consent or to withhold consent to a woman's abortion.

A common law right asserted by a putative father to enjoin an abortion was denied by the Florida courts.[245] The Court held the decision to abort is a right *"purely personal to the mother"*[246] and that the option to abort was not foreclosed by the prior willful act of intercourse, knowingly without the use of contraception. Putative fathers have similarly been held not to be indispensable parties in a suit against a hospital seeking to compel the performance of abortion.[247]

In *Doe* v. *Rampton*, etc., et al., 366 F.Supp. 189 (D. Utah 1973) a spousal consent clause was voided,

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[242] *W.* v. *M.*, et al., 490 S.W.2d 64 (Mo. 1973). The consent of the father to the adoption of a child born out of wedlock is required, unless he has willfully abandoned or neglected such child. (MO. REV. STAT., Section 453.040).

[243] *State of Missouri* v. *Tschirner*, 504 S.W. 2d 302, 305 (Mo.Ct. App. 1973); and *Gomez* v. *Perez*, 409 U.S. 535 (1973).

[244] *Stanley*, supra at note 241; *Gomez, id.; Levy*, etc. v. *Louisiana*, etc., et al., 391 U.S. 68 (1968); *Glona* v. *American Guarantee & Liability Insurance Company*, et al., 391 U.S. 73 (1968); and *Weber* v. *Aetna Casualty & Surety Co.*, et al., 406 U.S. 164 (1972).

[245] *Jones* v. *Smith*, et al., 278 So.2d 339 (Fla. Ct. App. 1973), *cert. denied*, 415 U.S. 958 (1974).

[246] *Id.* at 341.

[247] *Doe*, et al. v. *Bellin Memorial Hospital*, et al., 479 F.2d 756, 759 (7th Cir. 1973).

"(B)ecause it subjects exercise of the individual right of privacy of the mother, in all abortions at all stages of pregnancy, to the consent of others."[248]

In *Coe*, et al. v. *Gerstein*, etc., et al., 376 F.Supp. 695 (S.D. Fla. 1973), the federal panel stated,

"The failure of the Florida 'spousal . . . consent' requirement is that it gives to husbands . . . the authority to withhold consent for abortions for any reason or no reason at all. . . . It follows inescapably that the State may not statutorily delegate to husbands . . . an authority the States does not possess."[249]

In *Coe*, supra, consent was not required if the husband was "voluntarily living apart from the wife"[250], contrary to the herein challenged Section which permits situations beyond the realm of any rational State objective. Spousal consent in Missouri for women between the ages of 18 and 21 years of age was previously voided by the Eighth Circuit Court of Appeals.[251]

In those situations where the wife's life may be endangered by the pregnancy, at a point short of an abortion being necessary to preserve her life, this Section would grant to the husband-spouse the arbitrary life-controlling choice of risking his wife's death through his refusal to consent to the abortion. He would be free to make this choice even though the statistical chances of the fetus surviving the pregnancy might be far less than the odds of his wife surviving the pregnancy.[252]

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[248] 366 F.Supp. at 193.

[249] 376 F.Supp. at 698.

[250] FLA. STAT. ANN., Section 458.22(3) (1972).

[251] *Word*, et al. v. *Poelker*, etc., et al., 495 F.2d 1349, 1354 (8th Cir. 1974).

[252] For disapproval of arbitrary life or death decision making power without reasonable standards, see *Furman* v. *Georgia*, 408 U.S. 238 (1972).

Any weighing of interests between those of pregnant women and those of a spouse (even in those instances in which he has impregnated his wife) finds the balance heavily favoring the interests of the woman.

"His interests are principally economic, prospective, and contingent, and their realization is largely dependent upon the live birth of the child.

The wife's claim for protection equal to that extended to all other unwillingly pregnant women is based on her personal right to privacy in matters relating to the protection of her physical and mental health. A personal and not a property right, it is far more precious than mere property rights, and escapes meaningful economic measure."[253]

In affirming *Coe*, supra, sub nom., *Poe*, et al. v. *Gerstein*, etc., et al., 517 F.2d 787 (5th Cir. 1975), the Fifth Circuit Court of Appeals added,

"There is no requirement that the husband sire the fetus nor even that the woman be married, at the time of conception, to the same man whose consent is later required for the abortion. The statute therefore seems to base the husband's interests upon his marriage to the woman rather than his paternity of the fetus. As a consequence, the rights of the husband which arguably spring from his interest in the fetus are of doubtful applicability in this case."

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[253] Georgius, *Roe* v. *Wade. What Rights the Biological Father?*, 1 HASTINGS CONST. L.Q. 251, 271 (1974). For another discussion as to the various interests to be considered, concluding that the woman's right to an abortion must be supreme, see Robertson, *Paternal Rights in the Decision to Terminate a Pregnancy*, 2 THE WOMEN'S RIGHTS L. REP. 3 (1975), pp. 13-19. See, also, *Woman's Right to Have Abortion Without Consent of, or Against Objections of, Child's Father*, 62 A.L.R. 3d 1097.

"Moreover, we believe that the state interest in the husband's interest in the fetus is simply too attenuated to strip the woman of her fundamental right to privacy."

. . .

"In any case, the state may secure the man's procreative rights by merely making unconsented abortion a ground for divorce. The man may then enter into a new marriage relationship and the state may thereby protect his procreative interests without infringing upon the former wife's right to abortion."[254]

While a man may well have a fundamental right to procreate, that right can not be said to exist within any particular marriage nor with any particular woman.

Missouri has not seen fit to value the existence of previable fetuses in the field of torts and case law provides that only "a viable child, injured while en ventre sa mere, born alive, may after its birth, maintain a tort action."[255]

In the context of denying to a husband the right to control his wife's access to an abortion, the courts have distinguished cases such as *Meyer* v. *State of Nebraska*, 262 U.S. 390 (1923), *Skinner* v. *Oklahoma* ex rel. *Williamson*, etc., 316 U.S. 535 (1942), *Griswold*, et al. v. *Connecticut*, 381 U.S. 479 (1965) and *Loving*, et ux. v. *Virginia*, 388 U.S. 1 (1967), by noting that,

"These and other cases formed the basis for the court's recognition of a right of privacy in Roe v. Wade . . . But all those cases involved a shield for the private citizen against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens. . . . We find no basis for the husband's assertion that the Constitution enables him to summon the Commonwealth to help him in a dispute with his wife."[256]

A federal three-judge panel voided a Kentucky statute requiring husband's consent by noting that it gave,

"(P)ower to the husband . . . to withhold consent without any reason, or without good reason, or without good or sufficient reason, and entirely unconnected with the pregnancy or the woman's health."[257]

A federal panel in Pennsylvania reached the same conclusion.

"The challenged spousal consent provision of the Abortion Control Act is invalid because it does not balance the interest of the pregnant woman with the purported interest, if there is a constitutional one, of the husband; but rather the provision gives the spouse an unqualified and unconditional veto over the wife's decision to have an abortion, thus completely ignoring the fundamental right of the pregnant woman to make the abortion decision."[258]

The majority opinion of the District Court below attempted to justify upholding this challenged Section by exalting the marital relationship and the state's interest in it.[259] As to any such interest the state may have in this area, the state sees fit to give either party the freedom to dissolve the same with relative

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[254] 517 F.2d at 796-797.

[255] *Steggall*, etc., et al. v. *Morris*, 363 Mo. 1224, 1233 (1953), 258 S.W.2d 577, 581.

[256] *Doe* v. *Doe*, et al., — Mass. — (1974), 314 N.E. 2d 128, 130. See, *Pound* v. *Pound*, 42 L.W. 2456 (Ill. Cir.Ct., Jan. 31, 1974).

[257] *Wolfe*, supra at note 69, at 637.

[258] *Planned Parenthood Association*, et al. v. *Fitzpatrick*, et al., — F.Supp. — (E.D.Pa. 1975), slip opinion at 15-16.

[259] Jur. St. A-11 through A-13; 392 F.Supp. at 1369-1371.

ease.[260] The interest in the preservation of the relationship does not surpass the desire of the parties. Persons may marry, live their respective lives totally separate and apart, and still benefit from the tax or other legal advantages afforded to the legal concept of the relationship.

Stated simply,

> "(T)he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."[261]

The separateness logically implies differences and occasional stalemate. It is interesting to observe that in regard to consent for minors,[262] only one parent need consent, thereby engendering disagreement between the minor's parents as to whether an abortion should be permitted. This, of course, is the very type of marital discord which the defendants have attempted to rely upon in justifying this challenged Section. The prevalence of the demand for abortion among married women is significant, approximating 25% of the total demand for abortions; and the impact of this Section upon such population in Missouri is manifest.[263]

VI. Section 3(4)—The Requirement of Parental Consent for Unmarried Minors Under the Age of 18 Years.

This Honorable Court in *Roe* did not decide the constitutionality of statutes providing that "if the woman is an unmarried

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[260] MO. REV. STAT., Chapter 452.

[261] *Eisenstadt*, supra at note 240, at 453.

[262] Challenged Section 3(4).

[263] See, note 21 supra.

minor, written permission from the parents is required"; because, the issue not being then directly presented, there was no need to "decide whether provisions of this kind are constitutional."[264]

Nevertheless, plaintiffs contend here that the meaning and intent of this Honorable Court's decisions in *Roe* and *Doe* unquestionably prohibit a statutory requirement of written, parental consent.

This challenged Section blatantly affronts the holding of *Roe* that "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."[265] It is not merely the concept of parental consent which is void, but the state's requirement of the same, *per se*, and its cumuative effect and enforcement in application. *Shelley*, et ux. v. *Kraemer*, et ux., 334 U.S. 1 (1948), *et seq.*

Subjecting the medical decision of abortion to the prior approval of a minor woman's parent impermissibly intrudes into the First Amendment rights of medical advice and treatment between a physician and patient.[266] No other state statutes, criminal or otherwise, requires the additional consent of a minor's parent for medical or surgical treatment.[267]

Although the age of majority remains 21 years in Missouri,[268] by statute minors at 18 years in Missouri can independently con-

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[264] *Roe* at 165, at note 67.

[265] *Id.* at 163.

[266] See, IIA1, supra at 28.

[267] See IIB1b, supra at 37.

[268] *State of Missouri* ex rel. *McNary*, etc. v. *Stussie*, etc., et al., 518 S.W. 2d 630 (Mo. 1974).

sent to donate blood.[269] Minors in Missouri of any age can legally consent to medical services for pregnancy (excluding abortion), venereal disease and drug abuse.[270] Minors who are parents, whether married or unmarried, may statutorily consent to any type of medical service for themselves or for their child.[271] On its face, the general terms of the latter statute are inconsistent with the specific prohibition of the challenged Section in regard to unmarried minor parents. In summation, Missouri statutes expressly permit childless minors to consent to all medical services related to maternity or pregnancy (excluding abortions). Minors who are parents can also consent to maternity or pregnancy related medical services (excluding abortion) and seemingly authorize themselves to be sterilized.

It is only abortion which the State of Missouri has invalidly singled out for exclusion from the general treatment of pregnancy for minors[272] and for which the State of Missouri attempts to mandate parental consent out of the class of all other medical and surgical procedures.[273]

The requirement of parental consent, by the terms of this challenged Section, leaves no room for any exception or compromise among disagreeing family members. The absence of the required consent acts as an absolute bar on an abortion sought by a minor woman, unless her *life* is at stake. This occurs regardless of whether such consent has been specifically denied or otherwise not forthcoming for any of a host of possible reasons. In either case, refusal or failure of either parent to consent is legislatively allowed to override the joint decision of the patient and her physician.

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[269] MO REV. STAT., Section 431.064.

[270] MO. REV. STAT., Section 431.061.

[271] MO. REV. STAT., Section 431.065.

[272] See, IIB4a, supra at 50.

[273] See, IIB1b, supra at 37.

The subsequent result, mandated by this challenged Section, is the ultimate supremacy of the parents' desires over those of the minor child, the pregnant patient. The parents are given a right of veto.

On its face, this requirement interferes with the abortion decision and its effectuation with total disregard to the gestational period of pregnancy, because by its terms it is applicable at every stage of pregnancy.[274] It is totally unrelated to the concern of maternal health. In addition, it is arguable that parental consent under this Section would be required for the woman's use of an intra-uterine device (IUD) or any form of contraception which operates to prevent the implantation in the uterine wall[275] of a previously fertilized ovum.

The decree of the challenged Section's interference is illustrated in part by the trial testimony of Ms. Judith Widdicombe, Executive Director of Reproductive Health Services, the prime medical facility performing abortions in St. Louis, Missouri.

She testified that during the period from enactment of the challenged statute to date of trial (June 15, 1974 through July 22, 1974), her institution, as a direct result of compliance with this challenged Section, refused abortion services to 26 unmarried minor women for and by reason of the fact that they *would* not seek parental consent and, similarly, to 12 unmarried minor women who *could* not obtain parental consent.[276] A total of 38 unmarried minor women were denied abortions during a five-week period at one facility, alone, by operation of this challenged Section. Similar testimony was given by Dr. James C. Warren, Chairman of the Department of Obstetrics-Gynecology at Washington University Medical School and

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[274] See IIB1a, supra at 37.

[275] Bengston, *et al.*, supra at note 193.

[276] R. 151-152.

Barnes Hospital.[277] The magnitude of the crisis herein created is self-evident.

The only expert medical witness of defendants who performed abortions, Dr. Gerald G. Anderson, Chief of Obstetrics at Yale University[278] and plaintiffs' witnesses, Dr. Warren[279] and Judith A. Widdicombe,[280] all indicated that parental consent is only required of minors for an abortion because of the potential risk of civil liability, a risk which would be obviated by the voiding of this challenged Section and the recognition of a minor's constitutional right to abortion. The concept of informed medical consent involves more than the mere age of the consenting party; and the factors comprising informed medical consent are equally applicable to minors as they are to adults.

Defendants utterly failed to meet the imposed standard of a compelling state interest for this requirement.[281] Defendants unwarrantedly argued to the District Court that compelling childbirth upon a minor desiring an abortion, contrary to her parents' wishes, would somehow preserve the institution of the family more so than allowing an abortion over the wishes of objecting parents. The additional strains upon the family unit of another child hardly justify defendants' irrational conclusion and the irrebutable presumption[282] upon which the challenged Section is based—that marital harmony is better preserved by forcing motherhood upon an undesiring minor child than by denying to the minor child's parents the culmination of their child's pregnancy through birth.

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[277] *Id.* at 25-26.

[278] *Id.* at 302-303, 352-353.

[279] *Id.* at 25.

[280] *Id.* at 152.

[281] See, IIB2, supra at 40.

[282] See, IIB3ci, supra at 45.

This challenged Section suffers from being unconstitutionally vague and violative of *Roe* and *Doe*, as to the meaning and force of its sole exception clause, "as necessary in order to preserve the life of the mother."[283]

This challenged Section also suffers from the fatal defect of overbreadth.[284] The lack of parental consent in the case of any specific pregnancy may, under the challenged Section's terms, include the following circumstances: A minor impregnated through rape or incest; A minor emancipated, living apart from her parents and fully independent of them for any support, financial, emotional or otherwise; A non-virgin 16-year old minor statutorily of age to independently consent to sexual intercourse;[285] A minor whose religious views sharply differ from those of her parents as to the ethics of abortion; And a minor who previously had been married but now widowed or divorced, with or without other children of her own. None of these unmarried pregnant minors could obtain an abortion without parental consent under this challenged Section, unless the same was necessary to preserve her life; regardless of the myriad of other pressures or compelling justifications for choosing to terminate the pregnancy.

This challenged Section also violates the constitutional standard of privacy enunciated in *Eisenstadt*, supra,[286] that,

> "(I)t is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into mat-

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[283] See IIB3b, supra at 41; and the extended discussion specifically on this objectional wording under Point V (challenged Section 3(3)—Spousal Consent), supra at 76-81.

[284] See note 228, supra.

[285] MO. REV. STAT., Sections 559.260 and 559.300. A sexually experienced 16-year old female is therefore capable of consenting to intercourse two years earlier than she can consent to aborting the products of conception under the challenged Section.

[286] *Eisenstadt*, etc., supra at note 240, at 453.

ters so fundamentally affecting a person as the decision whether to bear or beget a child."

Missouri women who marry with parental consent under the age of 18 years[287] do not require parental consent to abort; yet their contemporaries who have chosen not to marry must seek such parental approval. Is it to be assumed that parental consent to marry is synonymous with parental consent to abort; and if that premise be true, why is such consent then withdrawn for a widowed or divorced minor under the age of 18 years, who still requires parental consent to abort under the challenged Section?

The need of minors for ready and available access to abortion services and the effects of such services upon them is well documented in the literature. Being unmarried and being young appear to be two independent factors which correspond directly with patient delay in seeking early abortions.[288] The dangers of such delay have been recognized.[289] The relationship between pregnancy, marriage and youth is also significant. One study in 1972 concluded that in Whatcom County, Washington, 73.3% of all 16-year old women being married were pregnant and 55.3% of all 17-year old women being married were pregnant.[290] Unmarried minors between the ages of 15 and 19 years constituted 16.2% of all abortions performed in New York City during 1971, 32.3% of all abortions performed in the State of California during 1973[291] and approximately

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[287] MO. REV. STAT., Section 451.090.

[288] Bracken, *et al., Delay in Seeking Induced Abortion: A Review and Theoretical Analysis,* 121 AMER. J. OBSTET. AND GYNECOL. 1008, 1010 (1975).

[289] *Roe* at 150.

[290] Tillack, *et al., A Study of Premarital Pregnancy,* 62 AM. J. PUB. HEALTH 676 (1972).

[291] *Provisional Estimates of Abortion Need and Services in the Year Following the 1973 Supreme Court Decisions: United States, Each State and Metropolitan Area,* THE ALAN GUTTMACHER INSTITUTE, New York: 1975, at 73.

29% of all abortions performed in the combined states of Alaska, Colorado, Delaware, Georgia, Hawaii, New York, Oregon and South Carolina during 1972.[292]

A national study of the sexual experiences of adolescents (ages 12-19 years) reveals that 45% of the females have engaged in sexual intercourse and only 32% of said adolescents were certain that some form of birth control had been practiced during the initial act of intercourse.[293] Generally, it has been recognized that "the decision to have intercourse was unrelated to contraceptive use."[294]

> "(T)he fact that teenage pregnancies have a greater risk of death and medical complications than pregnancies of older women has been documented extensively in the literature . . ."[295]

Not only do minors tend to seek abortions later in their pregnancies, but the medical risk to minors is greater than it is for older women for abortions sought at any stage of pregnancy. These statistical realities are compounded by this challenged Section which deters and encumbers the early abortion of minors by requiring their seeking and securing parental consent.

A pregnant minor, who has passed her seventeenth birthday and unable to obtain parental consent to abort, may well be forced to wait until her next birthday late into her pregnancy to terminate, greatly increasing the risk to her life. Or, she may

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[292] *Center for Disease Control: Abortion Surveillance: 1972,* U.S. DEPT. H.E.W., Atlanta: 1974, at figure 2.

[293] Sorensen, ADOLESCENT SEXUALITY IN CONTEMPORARY AMERICA, New York: 1973, at 213-214.

[294] Settlage, *et al., Sexual Experience of Younger Teenage Girls Seeking Contraceptive Assistance for the First Time,* 5 FAM. PLAN. PERSP. 223, 225 (1973).

[295] *Legalized Abortion and the Public Health,* supra at note 19, at 62.

instead choose to seek marriage with a sympathetic male, who will consent to the procedure, and agree to dissolve the marriage within a matter of days.

If challenged Section 3(3) falls, then this Section must similarly fail, for no rational distinction can be drawn between not requiring parental consent for a married minor but requiring parental consent for a minor previously widowed or divorced.

In all of the above situations in which the parents have played no part in the pregnancy, their lack of consent would serve to prevent an abortion from being obtained. Yet they would have no ongoing legal obligations, duties or rights in regard to the resulting child following its birth. They would be free to turn their backs and to ignore the child's welfare. The minor mother, however, would continue to have full legal obligations of support towards said child, including criminal sanctions in case of her failure to support.[296]

Missouri statutes require compulsory education only until 16 years of age and under certain circumstances only until 14 years of age,[297] allow minors of age 16 years to consent to an autopsy of a parent[298] and require the consent of any minor 14 years or older for their own adoption;[299] and yet this challenged Section precludes an unmarried minor under the age of 18 years the right to terminate a pregnancy for any reason (other than to save her life) without parental consent, which can be withheld for any reason or for no reason.

Generally, the courts have permitted minors of sufficient intelligence, education, maturity and experience to consent to

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[296] MO. REV. STAT., Section 559.353.

[297] *Id.*, Section 167.031.

[298] *Id.*, Section 194.115.

[299] *Id.*, Section 453.030.

medical procedures, absent specific statutory authorization. Judicial consent has been granted to mature minors for sterilization,[300] rhinoplasty,[301] skin graft[302] and tonsilectomy.[303] The factors employed to evaluate each minor, as to ability to give an informed consent, include the degree of education, intelligence, maturity, age, experience and judgment. The medical evaluation by the physician of these areas adequately safeguards whatever interest the state may have in protecting the minor from his or her own immaturity.

Analogously, the courts have also recognized the rights of minors for medical access to contraception.

> "The interest of minors in access to contraceptives is one of fundamental importance. The financial, psychological and social problems arising from teenage pregnancy and motherhood argue for our recognition of the right of minors to privacy as being equal to that of adults."
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> . . .
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> "(P)laintiff and her class must consult with a physician . . . and . . . will be aided by the mature judgment of trained adults before making important decisions regarding sexual conduct."
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> . . .
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> "(W)e hold that the state may not enforce the choice of parents in conflict with a minor's constitutional right of free access to birth control information and services."[304]

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[300] *Smith* v. *Seibly*, et al., 72 Wash.2d 16 (1967), 431 P.2d. 719.

[301] *Lacey* v. *Laird*, et al., 166 Ohio St. 12 (1956), 139 N.E.2d 25.

[302] *Younts*, etc. v. *St. Francis Hospital and School of Nursing, Inc.*, 205 Kan. 292 (1970), 469 P.2d 330.

[303] *Bishop* v. *Shurly*, 237 Mich. 76 (1926), 211 N.W. 75.

[304] *T—H—*, et al. v. *Jones*, et al., — F.Supp. — (D.Utah 1975), slip opinion at 12, 14 and 15.

Similarly is an unanimous three-judge panel decision in *Population Services International*, et al. v. *Wilson*, et al., 398 F.Supp. 321 (S.D.N.Y. 1975).[305]

Missouri today remains the only state not having established the right of women under the age of 21 years to obtain contraception solely on her own consent.

This Honorable Court has held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13 (1967).[306] Accordingly, this Honorable Court has found constitutionally guaranteed procedural safeguards and substantive rights applicable to minors as well as adults. It is reasonable to conclude from this line of cases that minor as well as adult women have a right to privacy, that this right is broad enough to include the decision to have an abortion and that this fundamental right can be limited only by compelling state interests.

Generally, no abortion may be performed if the woman, irrespective of age or competence, refuses to consent. It is illogical to argue that, although a minor may carry her child to term against her parents' will,[307] she should not be able to terminate her pregnancy against their will. In *Eisenstadt*, supra, this Honorable Court rejected the theory that states could distinguish between married and unmarried couples by limiting the distribution of contraceptives to the former. If *Eisenstadt*, supra, is to be

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[305] The right of minors' access to medical contraception assistance without parental consent or knowledge has been endorsed, among others, by the American Medical Association, The American College of Obstetricians and Gynecologists, The American Academy of Pediatricians. The American Academy of Family Physicians, The American College Health Association and the American Public Health Association.

[306] See, also: *Breed*, etc. v. *Jones*, 421 U.S. 519 (1975); and *Wood*, et al. v. *Strickland*, et al., 420 U.S. 308 (1975).

[307] *Matter of Smith*, 16 Md.App. 209 (1972), 295 A.2d 238.

followed, a distinction between married and unmarried minors with respect to the availability of abortions is also improper.[308]

The courts have unanimously held that parental consent may not constitutionally be required by the state as a prerequisite to a minor's access to abortion.

A District of Columbia Court first held parental consent for abortion was not required, stating,

> "Therefore the Court has found that although a juvenile, and despite her age, Respondent's status was one of quasi-emancipation; her degree of maturity and knowledge was such that she fully understood the nature of the proceedings; the nature of the operation, how the operation is performed, and effects of such an operation; and that having an abortion does not violate any of her religious beliefs, which are distinguished from those of her parents." *In re P.J.* (D.C.Super.Ct., Feb. 6, 1973), *reported in* 12 Crim. L.Rep. 2549 (Mar. 28, 1973).

The state Supreme Court of Washington has also struck down the statutory requirements of parental consent.[309]

> "In the circumstances envisioned by this statute, there seems to be little parental control left for the State to help salvage: . . . Reestablishment of parental control by resort to the pure force of the criminal law seems both futile

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[308] *Eisenstadt*, supra at note 240, at 453, may reasonably be read as foreshadowing the *Roe* and *Doe* decisions one year later, by its language made applicable to women who both choose "to bear or beget a child."

[309] *The State of Washington* v. *Koome*, 84 Wash.2d 901 (1975), 530 P.2d 260. See, also: *Ballard*, et al. v. *Anderson*, etc., 4 C.3d 873 (1971), 484 P.2d 1345, 95 Cal.Rptr. 1; *Matter of Smith*, 16 Md.App. 209 (1972), 295 A.2d 238; and "Opinion" of the Honorable Evelle J. Younger, Attorney General of the State of California dated January 18, 1974, holding that parental consent is not required if "minor has sufficient maturity to give an informed consent."

and manifestly unwise in such a situation. . . . The decision to continue or terminate her pregnancy is, in effect, her first 'parental' decision. It should not arbitrarily be subordinated to her parents' last."[310]

The first federal court to rule on this issue was an unanimous three-judge panel in Utah..[311] There the Court made short-shrift of the parental clause by stating,

> "Section 76-7-304 is invalid because it subjects exercise of the individual right of privacy of the mother, in all abortions at all stages of pregnancy, to the consent of others."[312]

Other federal district court panels have similarly held in Florida,[313] Kentucky,[314] Colorado,[315] Massachusetts,[316] and Pennsylvania.[317] An Indiana and a Nebraska provision have been preliminarily enjoined.[318]

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[310] *Id.*, 84 Wash. 2d at 907, 530 P.2d at 265.

[311] *Doe* v. *Rampton*, etc., et al., 366 F.Supp. 189 (D.Utah 1973).

[312] *Id.* at 193.

[313] *Coe*, et al. v. *Gerstein*, etc., et al., 376 F.Supp. 695 (S.D. Fla. 1973); *affirmed* sub nom. *Poe*, et al. v. *Gerstein*, etc., et al., 517 F.2d 787 (5th Cir. 1975).

[314] *Wolfe*, et al. v. *Schroering*, etc., et al., 388 F.Supp. 631 (W.D. Ky. 1974).

[315] *Foe* v. *Vanderhoof*, etc., et al., 389 F.Supp. 947 (D.Colo. 1975).

[316] *Baird*, et al. v. *Bellotti*, etc., et al., 393 F.Supp. 847 (D. Mass. 1975), cert. granted, — U.S. — (1975).

[317] *Planned Parenthood Association*, et al. v. *Fitzpatrick*, et al., — F.Supp. — (E.D.Pa. 1975).

[318] *The Gary-Northwest Indiana Women's Services, Inc.*, et al. v. *Bowen*, etc., et al. (N.D.Ind., No. H-74-289, Jan. 31, 1975); and *Doe*, etc. v. *Exon*, etc., et al., (D.Neb., No. CV75-L-146, Nov. 3, 1975). A single Federal judge has similarly held in an unreported opinion in New York. *Modugno* v. *Monsey Medical Center* (S.D. N.Y. No. 73C230).

"As we learn from Roe v. Wade, supra, the State has no authority to interfere with a woman's right of privacy in the first trimester to protect maternal health nor can it interfere with that right before the fetus becomes viable in order to protect potential life. It follows inescapably that the State may not statutorily delegate to . . . parents an authority the State does not possess."[319]

"(T)he broad provision as written gives power to the . . . parent to withhold consent without any reason, or without good or sufficient reason, and entirely unconnected with the pregnancy or the woman's health."[320]

"The interest of the state in fostering parental control or parental interests and responsibility in raising their children is perhaps the strongest interest asserted by the state in regard to the statute. . . ."

. . .

"However, those cases which have considered parental control of children have involved conflicts between parents and the state wherein the courts have considered intrusions by the state into the area of parental values—particularly religious values. Cases which have upheld parental control have not involved a situation where the parent and child differ and the state is imposing the parents' views on the minor."[321]

"(P)arents have years in which to teach their children, counsel them, and guide them. We may wonder how much would be accomplished by compulsorily affording a parent an eleventh hour opportunity, if adequate communication had not been established before. And we may wonder, also,

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[319] *Coe*, supra at note 313, at 698.

[320] *Wolfe*, supra at note 314, at 636-637.

[321] *Foe*, supra at note 315, at 956.

whether imposing such burden on the minor would necessily (*sic*) improve the family relationship."[322]

"However desirable it may be to have parents involved in the abortion decision, it is clear that the state may not destroy the fundamental right of the pregnant minor to make the final decision concerning abortion, provided that she is capable of making an intelligent, informed decision."[323]

Two circuit courts of appeal have also held parental consent clauses to be constitutionally void.[324]

"Indeed, it would appear that all of the criteria of *Roe* apply with even greater force to an unwed pregnant minor: teenage motherhood involves serious consequences including adverse physical and psychological effects upon the minor and her children, the stigma of unwed motherhood, impairment of educational opportunities caused by the need to drop out of school, and numerous other social dislocations. The magnitude of the minor's interest in avoiding these consequences suggests that the developmental differences between adults and minors do not warrant denying constitutional protection to the minor's abortion."[325]

Religiously motivated parents have previously been judicially estopped from threatening the medical well-being of minors in attempts to impose abortion[326] and to prevent blood transfusions.[327] Commentators have generally recognized the legal rights of minors to abortion services, free of parental knowledge and approval, and have recognized the dangers of denying the same.[328]

[322] *Baird*, supra at note 316, at 856.

[323] *Planned Parenthood Association*, supra at note 317, slip opinion at 19.

[324] *Word*, et al. v. *Poelker*, etc., et al., 495 F.2d 1349 (8th Cir. 1974); and *Poe*, et al. v. *Gerstein*, etc., et al., 517 F.2d 787 (5th Cir. 1975).

[325] *Id.*, *Poe* at 791.

[326] *Matter of Smith*, supra at note 309. If parents cannot impose their desire for an abortion upon a minor child, by what logic can they prevent such an abortion?

[327] *Jehovah's Witnesses in the State of Washington*, et al. v. *King County Hospital Unit No. 1 (Harborview)*, et al., 390 U.S. 598 (1968), *affirming* per curiam 278 F.Supp. 488 (W.D.Wash. 1967).

[328] See: NOTE, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VIRG.L.REV. 305 (1974); Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115 (1973); Skegg, *Consent to Medical Procedures on Minors*, 36 MODERN L.REV. 370 (1973); and Pilpel, *et al., Abortion and the Rights of Minors*, 23 CASE W.RES. L.REV. 779 (1972).

VII. **Section 6(1)—The Physician's Standard of Care.**

This challenged Section, requiring physicians performing abortions to preserve the life and health of the fetus as though it were intended to be born, is the only Section of the statute held to be unconstitutional by the District Court.[329]

The language of this challenged Section provides, in part,

"No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted."

This language literally runs counter to the remainder of the challenged statute, which permits abortions under given circumstances, and counter to the explicit directives of *Roe* and *Doe*. It is by definition impossible to abort a fetus while exercising

[329] Jur. St. A-20; 392 F.Supp. at 1371.

the same "skill, care and diligence" used "to preserve the life and health of any fetus intended to be born." This vague, ill-defined and self-contradictory clause had a "chilling effect" upon plaintiffs and others similarly situated. Its meaning applied across the board to all stages of pregnancy and for this reason alone, among others, was constitutionally defective.[330] It is totally unrelated to the concern of maternal health.

An unanimous court in *Doe* v. *Rampton*, etc., et al., supra, voided similar sections of the Utah law providing,

> "Medical procedure where fetus sufficiently developed. —If an abortion is performed when the fetus is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the medical procedure used must be that procedure which in the medical judgment of of the physician will give such fetus the best chance of survival, and no medical procedure designed to kill or injure such fetus may be used."
>
> "Medical skills to preserve life of fetus.—The physician performing any abortion must use all of his medical skills to promote, preserve and maintain the life of any fetus sufficiently developed to have any reasonable possibility of survival outside its mother's womb."[331]

The District Court stated,

> "Sections 76-7-309 and 76-7-310 are invalid because they might apply in any trimester, and because, regardless of the trimester in which they are applied, they unduly interfere with the professional judgment of the doctor involved."[332]

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[330] See, IIB1a, supra at 37.

[331] UTAH CODE ANN., Sections 76-7-309 and 76-7-310.

[332] 366 F.Supp. at 193.

In *Hodgson*, et al. v. *Anderson*, etc. et al., the unanimous court held invalid a like clause requiring abortions to be performed when the fetus is "*potentially* viable", "under circumstances which will reasonably assure the live birth and survival of the fetus."[333] An unanimous three-judge panel found that,

> "(T)hese subdivisions place restrictions upon the attending physicians during the *Roe* second stage which are not reasonably necessary for maternal health. In addition, these subdivisions prescribe procedures which are unnecessary in view of the existing professional standards and state health regulations attendant to any medical practice."[334]

An identical Pennsylvania statute required physicians during abortions,

> "to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted . . ."[335]

Noting that the Pennsylvania statute as to the physician's standard of care was unrelated to maternal health, the Court declared the same to be constitutionally void.[336]

Dr. Warren (R. 29), Dr. Thomas Kerenyi (R. 91) and defendants' witness, Dr. Anderson (R. 345) all testified that it is medically impossible to perform an abortion while simultaneously complying with the requirements of this challenged Section. There was no medical testimony to the contrary.

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[333] MINN. STAT., Section 145.412, subdivision 3(3).

[334] 378 F.Supp. at 1016-1017.

[335] PENN. ACT NO. 209, Section 5(a).

[336] *Planned Parenthood Association*, et al., supra at note 258, slip opinion at 29-30.

A fair and literal reading of this challenged Section reveals the intent that the first sentence, which utilizes the word "fetus," repeatedly and exclusively, and which contains no reference to a specific punishment, applies only to the intra-utero period. Similarly, the second sentence, which utilizes the word "child," repeatedly and exclusively, and which contains a reference to the specific punishment of manslaughter, applies only to the extra-utero period. Violation by a physician of the first sentence of this Section did remain punishable by Sections 12 and 14 of the challenged legislation.

The testimony of all witnesses further indicated that all methods of abortion, by definition and by design, are intended to produce the death of the fetus. Accordingly, the direct conflict between the first sentence of this Section and a woman's right to terminate a pregnancy is patent.

This Honorable Court wisely chose to leave the standards and duties of medical treatment by physicians where they rightfully belong, within "the usual remedies, judicial and intra-professional",[337] "professional censure and deprivation of his license."[338]

Lastly, to assume as defendants argued below, that Section 6(1), *in toto*, applies only post-natally, would create conflict and inconsistency as to the definition of the crime and its punishment with the pre-existing Missouri criminal, statutory scheme dealing with murder in the first degree,[339] murder in the second degree,[340] manslaughter[341] and killing of an unborn quick child.[342]

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[337] *Roe* at 166.

[338] *Doe* at 199.

[339] MO. REV. STAT., Sections 559.010 and 559.030.

[340] *Id.*, Sections 559.020 and 559.030.

[341] *Id.*, Sections 559.070 and 559.140.

[342] *Id.*, Section 559.090.

The District Court correctly held both in its "Order, Judgment and Decree" of January 31, 1975, and its "Order" of February 12, 1975, that the three sentences comprising the challenged Section 6(1) were not severable one from the other. (Jur. St. A-20 and A-35). 392 F.2d at 1374.

The second sentence of Section 6(1) is inextricably tied in with the first sentence, inasmuch as it refers to "*the* abortion" and "*the* child", an obvious reference to the preceding sentence. If this were not the case, the language utilized would undoubtedly be framed as "*an* abortion" and "*a* child".

As stated in 16 Am.Jur. 2d, *Constitutional Law*, Section 186, pp. 414-415,

> "If, however, the constitutional and the unconstitutional portions are so dependent on each other as to warrant the belief that the legislature intended them to take effect in their entirety, it follows that if the whole cannot be carried into effect, it will be presumed that the legislature would not have passed the residue independently, and accordingly, the entire statute is invalid." . . .
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> (I)f the purpose of a statute is to accomplish a single object only and some of its provisions are unconstitutional and void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portions."

The challenged Section 6(1) had the singular purpose of attempting to set forth a comprehensive standard of care prescribed for physicians during an abortion, both pre-natally and post-natally. The Missouri legislature presumably desired to enact an encompassing standard of care. It is beyond the area of judicial concern and competence as to whether the Missouri legislature would have enacted the remainder of Section 6(1) without the initial sentence, comprising approxi-

mately one-half of the entire challenged Section. They chose not to do so.

As cited with approval in *State* ex rel. *State Board of Mediation* v. *Pigg*, 366 Mo. 798, 820-821 (1951), 244 S.W.2d 75, 84-85,

> "The rule is stated in State ex rel. Transport Mfg. & Equipment Co. v. Bates, 359 Mo. 1002, 224 S.W.(2d) 996, 1001, as follows: 'It is generally true if the invalid provision of a statute and the residue thereof are wholly independent of each other, readily separable, and completely distinct; and if the residue is of itself complete, sensible and capable of being executed that the invalid provision will fall and the residue of the statute will stand. * * * The fact that the residue of an act remaining after a portion has been declared invalid may be complete in and of itself is not always sufficient to sustain it. If the invalid portion is so connected with the residue of the statute as to furnish the consideration for the enactment of the residue and as to warrant the belief that they were intended as a whole and that the Legislature would not have passed the part remaining had it known the other part would be held invalid, then the entire act must fall.' And see 50 Am. Jur. 354, Statutes, Sec. 353; 11 Am.Jur. 834, Const.Law, Secs. 152 and 155."

There can be little doubt that the various sentences of this challenged Section were intended as a unified and interdependent whole.

VIII. Section 7—The Termination of Parental Rights.

This challenged Section provides for the arbitrary and conclusive termination of parental rights in the event a live birth results when an abortion had been intended. It applies to all

mothers (unless the procedure was life-saving) and to consenting fathers (only fathers who are spouses being required to consent under Section 3[3]). It applies indiscriminately to all stages of pregnancy[343] and is a crude and coercive threat to dissuade women from electing abortion. It is totally unrelated to the concern of maternal health.

It adopts the dogmatic philosophy of those opposed to abortion under any circumstances: That abortion is the equivalent of murder. Desiring an abortion and the death of a fetus are not synonymous with desiring the death of a live child, in the event an abortion is not successful. An abortion may not initially be available, either for medical or other reasons, or it may be unsuccessful once commenced as envisioned by the statute. This irrebuttable presumption[344] of "unfitness" of and/or "abandonment" by a parent during an abortion has been specifically rejected by a Florida Appellate Court,

> "Appellant further contends, apart from the question of the 'right to privacy' that the termination of a pregnancy illustrates and reflects the 'unfitness of the mother' or 'the abandonment' of the unborn child. . . . Appellant's contentions are equally tenuous and as a practical matter overlook the decisions of the United States Supreme Court . . . We cannot conclude that a mother's decision to terminate a pregnancy gives rise to questions of 'unfitness' or 'abandonment'." *Jones* v. *Smith*, et al., 278 So.2d 339, 343 (Fla.Ct.App. 1973), *cert. denied*, 415 U.S. 958 (1974).

The statute itself recognizes the lesser value of fetal life by classifying the taking of "the life of a premature infant aborted alive" as "murder of the second degree".[345] Absent such spe-

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[343] See, IIB1a, supra at 37.

[344] See, IIB3ci, supra at 45.

[345] Section 6(2).

cific language, the taking of such life would be considered "murder in the first degree".[346] In light of *Roe* and *Doe*, this Section is no more sustainable than would be a similar effort to terminate parental rights of persons who experienced contraceptive failure.

In *Doe* v. *Rampton*, etc., et al., supra, the statute provided,

> "Child surviving abortion deemed ward of state.—Any child surviving an abortion shall become a ward of the state and the mother of such child and a father who has consented to such abortion shall have no parental rights with regard to such child."[347]

The unanimous federal panel held,

> "Section 76-7-311 is invalid because it threatens every woman who has an abortion, at any stage of pregnancy and for any reason, with termination of parental rights without due process of law."[348]

Roe and *Doe* clearly stand for the principle that a pre-viable fetus is not the equivalent at law of a living person. "(T)he word 'person', as used in the Fourteenth Amendment, does not include the unborn."[349] This distinction is further demonstrated by the challenged statute's permissive stance towards abortion under certain circumstances and conditions.

As this Honorable Court noted in *Stanley* v. *Illinois*, 405 U.S. 645 (1972), when offering full protection to the rights of putative fathers in regard to their children,

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[346] MO. REV. STAT., Section 559.010.

[347] UTAH CODE ANN., Section 76-7-311.

[348] 366 F.Supp. at 193.

[349] *Roe* at 158.

> "Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family."
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> . . .
>
> "We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause."[350]

There are no other statutory provisions providing for arbitrary and conclusive termination of parental rights under any other factual situation. Parents of children who commit upon them the greatest abuses, even acts threatening their very lives, are not subject to the gross denial of due process and equal protection attempted here. This vindictive excessive exercise of state power to punish and to deter women from choosing abortion must not be allowed to persist.

Dr. Warren testified that women "are stressed to some degree whether or not to undergo an abortion. It is a stressful decision." (R. 30). Dr. Warren further testified that it is his medical practice to discuss the possibility of a live birth with his patients only "(i)n second trimester cases . . . as an unlikely probability." (R. 32).

Defendants' witness, Dr. Anderson, the only witness of defendants who possessed personal experience with women undergoing abortions, testified as follows,

> "Q. Doctor, assuming you were performing an abortion in a jurisdiction which had this statutory requirement, and assuming that you were to verbally inform the patient of the provisions of this Section 7 by merely reading it to her

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[350] 405 U.S. at 658.

as it appears, do you have an opinion as to what emotional or psychological effect, or even physical effect, this might have upon the patient?

A. Well, I—I—I can imagine that it would have an—an adverse psychological effect on the patient.

Q. Adverse in what way?

A. Well, the patient has already made a rather tenuous major decision in her life; she needs positive support and not negative input previous to the abortions.

Q. In what way do you consider this to be negative input?

A. Well, I feel that the patient came to us for an abortion. An abortion means delivery of a dead fetus. Very little thought is given by any patient to the possibility of a live fetus coming out of this. That's not what they came to us for. I frankly would not present this to a patient even if it were state law.

Q. Would you choose to violate the law?

A. Yes.

Q. Do you feel that the reading of this provision to the patient would have a significant impact upon her decision-making process in regard to the abortion?

A. In some patients it certainly could." (R. 351-352).

It is no more reasonable for the state to assume that a woman, who is denied an abortion initially for medical reasons prior to the procedure, is any less committed to the abortion than a woman who is denied an abortion because the intended result of the procedure did not occur. Yet, clearly, many women, unable for medical reasons to undergo an abortion, choose to rear the children born to them as loving parents. The singular and obvious purpose of this Section is to coerce, to harass and to

intimidate women into the choice of carrying to term as opposed to the choice of terminating the pregnancy.[351]

This Section places upon the physician the affirmative duty to determine in each case whether: (a) the procedure "was not performed to save the life or health of the mother"; (b) whether the mother consented to such abortion; and (c) whether the father consented to such abortion. After making said determinations and, if the answer to each is in the affirmative, the physician is compelled to "forthwith notify said juvenile court of the existence of such live born infant." Failure to properly make such determinations and to provide such notification, when required, subjects the physician to the penalties of Sections 12 and 14 of the challenged legislation.

The effect of this Section is surprisingly, although nevertheless unconstitutionally, to grant to putative fathers greater rights than are granted therein to fathers who are concomitantly spouses of the patients. A spousal father must consent initially under Section 3(3) for the procedure to occur and therefore, if the abortion is unsuccessful, his parental rights are lost under this Section. A putative father need not consent for the procedure to occur and therefore, if the abortion is unsuccessful, his parental rights are preserved intact. A putative father has full rights in regard to[352] and full responsibilities for[353] his children in Missouri. Despite the unique peculiarity for granting greater rights to putative fathers than to fathers married to the mother, the disparity is nevertheless violative of the precepts of *Stanley*, supra, and its progeny.

This challenged Section discriminates against children resulting from such abortions by denying to them in conjunction

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[351] See, IIB4a, supra at 50.

[352] *In re R.D.H.S.*, etc., 370 S.W.2d 661 (Mo. 1963).

[353] *E—M—R—*, et al. v. *G—E—R—*, 431 S.W.2d 152 (Mo. 1968).

with Section 3(3) supra, the right to a relationship and its accompanying duties and rights with their natural fathers. That relationship is preserved under this challenged Section for such children, only if their natural fathers are not married to their natural mothers.

As succinctly put in the dissenting opinion below,

> "This section in my view contains an incurable constitutional flaw: it is totally lacking in procedural due process."[354]

As the dissenting opinion rightfully concluded in its discussion of this Section,

> "The chilling effect of such legislation is so obvious as to require no further discussion; it clearly and explicitly exceeds regulation 'reasonably related to maternal health'."[355]

IX. Section 9—The Prohibition of Saline and Similar Procedures.

This challenged Section seeks to prohibit, after the first twelve weeks of pregnancy, the procedure for abortion "known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac . . ."

The total prohibition of the saline amniocentesis method of abortion is a thinly disguised effort to foreclose effectively all post first trimester abortions and as such it is constitutionally abhorent upon several separate grounds formulated in *Roe* and *Doe*.

This Honorable Court in authorizing the state "(f)or the stage subsequent to approximately the end of the first trimester"

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[354] Jur. St. A-26; 392 F.Supp. at 1377.

[355] Jur. St. A-27; 392 F.Supp. at 1377.

to "regulate the abortion procedure in ways that are reasonably related to maternal health"[356] was careful to delineate the "ways" it had in mind.

> "The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of aftercare, and to adequate provision for any complication or emergency that might arise."[357]
>
> "Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like."
>
> "This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."[358]
>
> "The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to

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[356] *Roe* at 164.

[357] *Id.* at 150.

[358] *Id.* at 163.

those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available."[359]

This Honorable Court never intended to allow the state to prescribe to the physician the particular methods or procedures by which the profession of medicine could be practiced. The state does not attempt to prescribe in regard to any other known medical or surgical area.[360]

The language of the Eighth Circuit Court of Appeals in *Word*, supra, is particularly applicable and persuasive. In *Word*, supra, the Court found each and every regulation proposed to be unrelated to a legitimate state interest in maternal health.

"The city ordinance in question here reflects no recognition of the fundamental rights involved and the commensurate restrictions on state action. Neither are we cited to any persuasive data convincing us that the stringent regulatory measures in the act are necessary to protect either the state's interest in maternal health or future life. No other medical procedures or surgical operations are cited to us where the city or state regulates at the peril of criminal sanctions."

. . .

"Appellee argues . . . the ordinance here does not prohibit abortion but merely regulates the 'persons, conditions

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[359] *Roe* at 165-166.

[360] See, IIB1b, supra at 37.

and procedures under which abortions are to be performed.' While we agree with appellee that the ordinance does not proscribe abortions, we do not agree that that fact, of itself, removes the ordinance from the constitutional realm of *Roe* and *Doe*. The *Doe* decision clearly struck down portions of the Georgia statute governing abortion procedures. Doe v. Bolton, supra 192-200 of 410 U.S., 93 S.Ct. 739. We learn from *Doe* that sweeping regulation of the abortion procedure without regard for the conflicting interests involved will not withstand constitutional scrutiny." . . .

"Viewed another way, there is reason to strike down this ordinance. The ordinance seeks to protect interests that are already adequately protected by (1) the physician's medical judgment and professional, ethical standards and (2) the city and state health regulations which are in effect and which have application to clinical procedures in general. The extra layer of regulation which this ordinance imposes becomes unreasonably burdensome of the patients' and physicians' rights."

. . .

"We think that this myriad of requirements is unduly restrictive of a physician's right to administer his judgment as to an operation that is now established to be, within the first trimester of pregnancy, safer than childbirth. We are referred to no other single surgical procedure where doctors are required to 'prove up' their overall fitness as they are here. As the court states in Doe v. Bolton, supra at 199 of 410 U.S., at 751 of 93 S.Ct.: 'If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment.' To single out physicians and their patients who seek abortions and subject them to this ordinance's overview substantially lim-

its the physician's right to practice and the patient's right to her doctor's independent judgment."[361]

The Fifth Circuit Court of Appeals has held in regard to the licensing of the medical arts,

> "Under all of the cases, we think . . . (the dividing line) is that the State cannot deny to an individual the right to exercise a *reasonable* choice in the method of treatment of his ills, nor the correlative right of practitioners to engage in the practice of a useful profession."[362] (Parenthetical material supplied).

The observation that only the physician can determine the need for and method of appropriate treatment for the patient has been recognized by this Honorable Court in both *Roe* and *Doe*.

Defendants' expert witness, Dr. Anderson, testified: that saline is the most commonly used method during the second trimester (R. 327); that, although he personally believes prostaglandins to be safer than saline, saline is safer than all other known methods (R. 328-329); that saline is safer than child birth (R. 343a); and that, if prostaglandin contraindication warnings, as issued by the Federal Drug Administration, were to be heeded, his clear choice of procedure over all other methods would be saline. (R. 343-343a). Dr. Anderson further testified that many medical schools are using the saline method (R. 365); that the availability of prostaglandins is limited (R. 335); that in certain areas the physiological role of prostaglandins is totally unknown and it is quite possible that the side effects of prostaglandins are unknown due to their recent

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[361] 495 F.2d at 1351-1352.

[362] *England*, et al. v. *Louisiana State Board of Medical Examiners*, et al., 259 F.2d 626, 627 (5th Cir. 1958), *cert. denied*, 359 U.S. 1012 (1959).

development (R. 363, 366); and that saline is not an "unsafe procedure" (R. 365).

No evidence was introduced to the District Court indicating that any physician in the State of Missouri was capable, willing or experienced in the use of prostaglandin.[363]

This challenged Section attempts to prohibit any procedure whereby "amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor." It cannot be ignored that this description includes the use of prostaglandins. Amniotics fluid is withdrawn during the prostaglandin procedure (R. 36 [Dr. Warren] and R. 86 [Dr. Kerenyi]) and, in fact, it is the recommended procedure by the Federal Drug Administration (R. 36-37 [Dr. Kerenyi]). Prostaglandins are injected in liquid fluid form. (R. 318 [Dr. Anderson]). The purpose of using prostaglandins is to kill the fetus and induce labor (R. 87 [Dr. Kerenyi] and R. 333-334 [Dr. Anderson]). Following the injection of prostaglandin there is a "period of uterine tetany that lasts at least 20 minutes, during which the fetus received no oxygen" and this produces death or "extremely severe" brain damage (R. 345-346 [Dr. Anderson]). This challenged Section also excludes the use of any other abortifacient fluids administered in like fashion, which may be discovered in the future and, perhaps, be safer than both saline and prostaglandins.

The nature of medical practice demands a degree of professional independence, isolated from the vagaries of politically influenced legislation. As affirmatively stated in *Doe*,

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[363] One District Court has recognized that "(t)here are presently three common methods of performing an abortion; injection of a saline solution; the so-called vacuum method, and a hysterotomy." *Baird*, et al. v. *Bellotti*, etc., et al., 393 F.Supp. 847, 853 (D. Mass. 1975), *cert. granted*, — U.S. — (1975).

"If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure and deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice. The attending physician will know when a consultation is advisable—the doubtful situation, the need for assurance when the medical decision is a delicate one, and the like. Physicians have followed this routine historically and know its usefulness and benefit for all concerned. It is still true today that '[r]eliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he [the physician] possesses the requisite qualifications.' *Dent* v. *West Virginia*, 129 U.S. 114, 122-123 (1889). See *United States* v. *Vuitch*, 402 U.S. at 71."[364]

If a consensus of physicians is not constitutionally permitted, by what logic can the consent of the legislature regarding a medical decision be condoned.

A Congressional attempt to restrict the amount of alcohol a physician could prescribe during Prohibition was similarly declared constitutionally impermissible,[365] as was a recent attempt by the District of Columbia City Council to restrict the practice of acupuncture.[366]

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[364] *Doe* at 199-200.

[365] See, *United States* v. *Freund*, 290 Fed. 411 (D. Mont. 1923).

[366] See, *Wensel*, et al. v. *Washington*, etc. (D.C. Super. Ct., No. 11004-74, Apr. 10, 1975) voiding a District of Columbia regulation limiting the practice of acupuncture to physicians and dentists. The Court held the regulation unconstitutionally interfered with medical practice by not permitting the practice of acupuncture by others under the direction, care or supervision of a physician.

No persuasive data was offered to the District Court to justify the exclusion of the saline method. It should be noted that this challenged Section not only prohibits the injection of a saline fluid but also any "other fluid". The exclusion of all "other fluid(s)" makes a legislative presumption that no such method can or will be developed in the future capable of passing legislative muster as to being in the interests of maternal health.

Even assuming, *arguendo*, that this Honorable Court intended to authorize the states to legislate which particular surgical or operative methods might or might not be used by physicians, the evidence at trial clearly did not justify the total exclusion of the saline method and similar methods proscribed by this challenged Section.

The testimony of Dr. Warren was that 75% of all abortions performed in the second and third trimesters within the United States are by the saline method. (R. 42). Dr. Kerenyi placed their prevalence at 80%. (R. 89-90) and defendants' witness, Dr. Anderson placed the figure at 68.7%. (R. 327). Prohibition of the saline procedure would be effectively to foreclose nearly all second trimester abortions throughout the State of Missouri, for the remaining methods performed are highly more dangerous to patients.

This Section attempts by indirection to impose upon patients and their physicians an alternative less effective method for second trimester abortions, that of prostaglandins. The trial evidence indicated that live births are more frequent with the use of prostaglandins than with saline. (R. 47, 96). In other words, this Section leaves as the only safe alternative, a method which is less medically effective as to its intended result and one not readily practiced in the United States and, perhaps, not practiced at all in the State of Missouri.

The other alternative methods remaining impose upon patients and their physicians medical procedures far more dan-

gerous than the prohibited method of saline. Defendants attempted to deluge the District Court with articles discussing the medical dangers of saline. The mortality and morbidity risks of any procedure are meaningless, unless compared to the risks of other available and like procedures. The medical literature is replete with articles discussing every known procedure and their respective complications. Plaintiffs do not dispute that the use of the saline method involves risk to the patient; as do all other known methods of abortion or surgical procedure.

Dr. Warren testified that all medical procedures involved a risk of mortality (R. 34); that at this point of time, there is no reason to believe that the mortality rate of prostaglandins is less than that with saline (R. 42); that the mortality rate with saline is 17.5 per 100,000 (R. 43); that the mortality rates for the two other methods not proscribed by the statute are 200 per 100,000 for hysterotomy and 200 or 250 per 100,000 for hysterectomy (R. 43); and that the saline method is safer than childbirth (R. 44). Dr. Warren further testified that while saline has been in use for ten years in the United States, prostaglandins have been used on a non-experimental basis only since January 1, 1974 (R. 45-46).

Dr. Kerenyi testified that in his experience there has been no related deaths and one reported, but saline unrelated, death ten years ago in 1964 in some 12,000 saline procedures (R. 86, 88); that saline is the only method for which reliable statistics are available due to an inadequate experience with the other methods suggested by defendants (R. 87); that saline is the safest method (R. 88); that mortality with saline is 15 per 100,000, with hysterotomy 200 per 100,000 (R. 89, 88) and with child birth 20 per 100,000 (R. 94), making saline safer than delivery. (R. 95). Dr. Kerenyi further testified that all side effects of prostaglandins are not presently known (R. 96); that he is an investigator for the Upjohn Company, the exclusive licensed manufacturer (R. 335 [Dr. Anderson]); and that Upjohn reports a

60% gastro-intestinal side effect rate with the use of prostaglandins (R. 97-99).

> "When certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[367]

This challenged Section has been penned with a broad brush. It excludes the most overwhelmingly used method of abortion during the mid-trimester, excludes methods not yet and to be developed, which may prove more or less safe than those excluded, and does not exclude methods such as hysterectomy and hysterotomy which are acknowledged to be at least ten times less safe than saline.

Further, it unconstitutionally favors the one choice of bearing children over the election of abortion, inasmuch as the uncontradicted testimony showed saline to be safer than child birth.[368]

This identical question was resolved by a federal panel in Kentucky.

> "This section prohibits the use of the saline method of abortion after the first trimester of pregnancy. Defendants contend, and it is not seriously questioned, that the prostaglandin method is safer and, in general, clinically more desirable than the saline method. In each process a solution is injected into the amniotic cavity of the patient, causing contractions of the uterus sufficient to expel the fetus through the vagina. The mere fact prostaglandin is safer does not supply sufficient reason to exclude other methods, especially where doing so would unreasonably infringe upon

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[367] *Roe* at 155.

[368] See, IIB4a, supra at 50.

fundamental rights. After an examination of the evidentiary material submitted by the parties, the Court is of the opinion that the saline method of abortion has been wrongfully excluded. Practically all post-first trimester abortions are now performed by the saline method. According to the preponderance of evidence, prostaglandins are manufactured and controlled by Upjohn Company and are available only to a select, elite group of physicians. At present, there are no physicians in Kentucky competent in the technique of prostaglandin amnio infusion. Consequently, this method of abortion is not readily available in this geographical territory. There are no centers or doctors licensed to perform such a procedure in this area. With prostaglandin unavailable, and saline prohibited, the woman wishing abortion after the first trimester is practically rendered destitute, her only recourse, hysterotomy, being by far the most dangerous of the three methods. Thus, the Court is convinced from the evidence that in order for there to be an effective, safe method, and one which is generally available for the performing of post-first trimester abortions, this section must be held to be invalid."[369]

In *Doe*, this Honorable Court precluded the state from requiring a doctor to receive the concurrence of two other trained medical physicians.[370] It cannot be said that the concurrence of the Missouri legislature as to the physician's best judgment is more appropriate and thus sustainable. The noted remedies in case of a physician's abuse of proper medical judgment, those of "judicial and intra-professional",[371] "professional censure and deprivation of his license",[372] are the most appropriate re-

[369] *Wolfe*, supra at note 314, at 637.

[370] *Doe* at 199-200.

[371] *Roe* at 166.

[372] *Doe* at 199.

courses. The attempt by the Missouri legislature to impose a prior censorship upon the physician-patient relationship and the mutual medical decisions to be therein made is constitutionally invalid.[373]

X. **Sections 10 and 11—Record Keeping and Reporting.**

Challenged Sections 10 and 11 provide for the Missouri Division of Health to require the maintenance and preservation for seven years of medical data on all abortions performed. It should be noted that at the time of trial, the Missouri Division of Health had not promulgated rules and regulations pertaining to the same. For the convenience of this Honorable Court, the presently published cover letter, instructions and forms have been reprinted, *in toto*, as an addendum to this brief.[374]

It should be noted that the information, authorized to be sought and to be required by the challenged Sections and as formulated, applies to all abortions, regardless of the gestational stage, contrary to the dictates of *Roe* and *Doe*.[375] No evidence was presented to the District Court justifying the record keeping requirements as bearing on maternal health. No evidence was introduced which indicated similar reporting or record keeping requirements for any other comparable medical or surgical procedure, required as an assistance to patient health.[376] Similar

[373] As to the prohibition against prior restraint of fundamental rights involving freedom of speech and the right of privacy, see *Erznozrik*, etc. v. *City of Jacksonville*, — U.S. — (1975).

[374] The *Addendum* to this brief comprises in the following order: the cover letter dated January 10, 1975 from Director Land at A-1; multipaged instructions dated 1/1/75 at A-2-A-5; original reporting form SS2-1/75 at A-6; and presently used form, entitled "Induced Pregnancy Termination Report" at A-7.

[375] See, IIB1a, supra at 37.

[376] See, IIB1b, supra at 37.

requirements were not shown to exist for childbirth delivery services.[377]

Federal court decisions to date have unanimously rejected comparable reporting requirements, when the same sought to apply to abortions at all stages of pregnancy.

In *Word*, supra, the ordinance required information as to "the name, age and address of the person, the dates on which he examined her and his best medical judgment as to the date of conception of the fetus."[378] The Eighth Circuit held the ordinance void for failure to exclude the first trimester[379] and for imposing "an extra layer of restriction . . . that unduly penalize(s) those patients who seek and those doctors who choose to perform abortions . . ."[380]

In *Doe* v. *Rampton*, etc., et al., supra, the statute required,

> "Physician's report to state department of health.—In order for the state department of health to maintain necessary statistical information and in order to ensure enforcement of the provisions of this act, any physician performing an abortion must obtain and record in writing the following information: The age of the pregnant woman; her marital status and residence; the number of previous abortions performed on her; the medical reason necessitating the abortion; the hospital or other facility where performed; the weight in grams of the fetus aborted; the pathological description of the fetus; the given menstrual age of the fetus; the measurements; and the medical procedure used. Said information, together with all written consents required for the abortion and a certification by the physician that the fetus was or was not capable of survival outside of the mother's womb, must be filed by the physician with the state department of health within ten days after the abortion."[381]

[377] See IIB4a, supra at 50.

[378] 495 F.2d at 1354.

[379] *Id.* at 1351.

[380] *Id.* at 1352.

The Court held in this regard that,

> "Section 76-7-315 is invalid because it subjects the abortion decision to public scrutiny by making the details of every abortion a matter of public record and thus chills exercise of the right of privacy in the abortion decision."[382]

Minnesota Health Department Regulations 281 and 282, adopted pursuant to Minnesota Revised Statutes, Section 145.416, provided,

> "MHD 281: Internal Records of the Ambulatory Facility
>
> (a) Patient Records
>
> The pregnancy termination facility shall keep records of each patient undergoing a pregnancy termination procedure which shall include admission and discharge notes, a signed consent form, pertinent medical history, results of tests and examinations, termination procedure report, pathology report, report of after-care, counseling records, results of follow-up contact, and other progress notes.
>
> (b) Complications
>
> All surgery-related or anesthesia-related complications which result in morbidity or death of a patient shall be recorded in detail in the patient's medical record.
>
> (c) Confidentiality
>
> Each facility shall maintain and ensure confidentiality of individual patient records."

[381] UTAH CODE ANN., Section 76-7-315.

[382] 366 F.Supp. at 193.

"MHD 282: Reports to the Board

(a) Statistical Reports

Each ambulatory facility shall submit a written compilation of statistical data quarterly to the Board on such forms and in such manner as the Board may prescribe.

(b) Reporting Terminations

An ambulatory facility shall report all pregnancy terminations performed by its staff as follows:

(1) By the 10th of each month all pregnancy termination performed in the ambulatory facility during the preceding month shall be reported on forms prescribed by the Board which shall include but not be limited to the following items:

Patient's city, county and state of residency

Census Tract for City of Minneapolis and City of St. Paul

Patient or Chart No.

Age

Race

Marital Status

Number of Living Children

Facility Name

Facility Address

Number of Previous Induced Pregnancy Terminations of Patient

Estimate of Gestational Age

Date of Pregnancy Termination

Type of Termination Procedure

(2) All surgery-related or anesthesia-related complications which result in morbidity or death of a patient shall

be reported in writing to the Board within 15 days from the notification to the ambulatory facility of the morbidity or death of the patient.

(3) The Board shall ensure and maintain confidentiality of an individual pregnancy termination records."[383]

The unanimous District Court panel held,

> "Finally, we reach the Regulations for Termination of Pregnancy. The regulations are completely without constitutional foundation insofar as they may be applied to facilities involved in administering to first trimester abortions. The words of *Roe* are unequivocal—'free of interference by the State'."[384]

Similar requirements enacted by the City of Chicago's Board of Health required,

"IV. *Records and Reports, Inspection*:

(a) Each Abortion Service shall keep records including admission and discharge notes, histories, results of tests and examinations, nurse's work sheets, social service records, and other progress notes of patients, and it shall submit such records when the Chicago Board of Health shall so require.

(b) Each Abortion Service shall prepare a monthly report which shall be submitted to the Chicago Board of Health on forms prepared by the Chicago Board of Health not later than the 5th day following the end of the month. Such reports shall include the following:

(1) Number of patients requesting abortions

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[383] 378 F.Supp. at 1026-1027.

[384] 378 F.Supp. at 1018.

(2) Number of patients and age on whom abortions were performed according to the period of gestation and method of termination of pregnancy

(3) Number of patients for whom abortions were refused and the reasons therefor; and

(4) Number of patients referred to other abortion services

(5) Name and address of patients with a statement of complications following elective abortions describing the nature of the complication.

(c) A statement indicating informed consent in writing and a signed authorization for the performance of an abortion shall be obtained for each patient prior to the procedure."[385]

The Seventh Circuit in *Friendship Medical Center, Ltd.*, supra, invalidated those provisions firstly because,

> "(T)hey regulate during the first trimester precisely the type of things that the Supreme Court has said cannot be regulated until after that 'compelling point'."

and secondly, because,

> "The Chicago Board of Health's Rules on Abortion Services regulate comprehensively physicians who perform abortions, while at the same time leaving other medical procedures, often much more complex and dangerous in terms of the patient's health, up to the good judgment of the physician. . . . The Board of Health has offered no

[385] Set forth in *Friendship Medical Center, Ltd.*, et al. v. *The Chicago Board of Health*, et al., 367 F.Supp. at 610-611.

> sufficiently compelling reason to justify this difference in treatment."[386]

Not a single court has upheld the reporting and recordkeeping provisions authorized under these challenged Sections and subsequently enacted, when the same have as here, intruded through application upon the early stages of pregnancy and have not been demonstrated to relate to the maternal health at later stages of pregnancy.

A New York court in light of *Roe* and *Doe* has similarly held that the requirement of the name and address of the aborting patient upon a fetal death certificate violated the patient's right of privacy, the physician-patient relationship and was contrary to public policy.[387]

CONCLUSION

The statement by the First Circuit in *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144, 146 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975) is equally applicable here.

> "We need not determine whether there may exist situations where the practical impact of a restriction upon abortions would be so insignificant that constitutional scrutiny would not be triggered. That is certainly not the situation here. . . . As the Supreme Court made clear in Doe v. Bolton, it is not only complete proscription of abortion which is unconstitutional, but barriers which 'unduly restrict' the rights of the woman . . ."

While 75% of the world's population live in countries in which abortion is permitted under circumstances broader than

[386] 505 F.2d at 1152-1153, *cert. denied*, 420 U.S. 997 (1975).

[387] *Schulman*, et al. v. *New York City Health and Hospitals Corporation*, et al., 75 Misc. 2d 150 (1973), 346 N.Y.S.2d 920.

merely to save the life of the patient;[388] the full impact of this Honorable Court's decisions in *Roe* and *Doe* remain unavailable to the vast majority of our nation's citizens. It is estimated that during 1974, the first full year following the decisions in *Roe* and *Doe*, at minimum 365,770 and at maximum 876,240 women who desired abortions were unable to obtain one.[389] Based on a total of 892,200 abortions performed, approximately 29% to 50% of the need for abortions was not met.

In 36 states less than one-third of the state's residential need was met in 1973 and in only four states was more than two-thirds of the state's residential need met, based on higher estimates and giving all benefits of doubt to the conclusion that such needs were met.[390] By the first quarter of 1974, 85% of the nation's public hospitals had not provided abortion services for their communities.[391]

This denial of access to the full enjoyment of constitutional rights has been encouraged by legislative interference, of which the challenged Sections herein are sadly typical. The words of this Honorable Court many years ago, today still ring true,

> "(C)onstitutional rights . . . can neither be nullified openly and directly by state legislators or state executive

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[388] Population figures were taken from THE WORLD ALMANAC & BOOK OF FACTS 1975, Newspaper Enterprise Association, Inc., New York: 1974 for selected United Nations membership countries; and compared with abortion practices as reported in a pending publication entitled *Legal Handbook on Contraception, Voluntary Sterilization and Abortion: Country Profiles and Checklists*, THE FLETCHER SCHOOL OF LAW AND DIPLOMACY, Medford, Mass.: 1975. The 75% figure is, accordingly, a conservatively low estimate.

[389] *Provisional Estimates of Abortion Need and Services in the Year Following the 1973 Supreme Court Decisions: United States, Each State and Metropolitan Area*, THE ALAN GUTTMACHER INSTITUTE, New York: 1975, at 22, at Table D and at 24, at Table E.

[390] *Id.* at 32, at Table Q.

[391] *Id.* at 39, at Table Y.

> or judicial officers, nor nullified indirectly by them through evasive schemes . . . whether attempted 'ingeniously or ingenuously.'" *Cooper*, et al. v. *Aaron*, et al., 358 U.S. 1, 17 (1958).

Each and every statutory Section herein challenged has been previously adjudicated by one or more federal panels and/or appellate circuits. With the sole exception of the District Court opinion rendered below, said federal courts have uniformly voided and declared unconstitutional all of the challenged legislation.[392]

Wherefore, plaintiffs respectfully pray that the opinion of the Appellate Court be reversed as to Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11 and the same be declared unconstitutional; and plaintiffs respectfully pray that the opinion of the Appellate Court be affirmed as to Section 6(1) and the same be declared unconstitutional.

Respectfully submitted

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[392] On November 22, 1975 a temporary restraining order was issued against the enforcement and application of an Illinois statute incorporating all of the provisions herein challenged. *Wynn*, et al. v. *Scott*, etc., et al. (N.D.Ill., No. 75C3975, Nov. 22, 1975).

Certificate of Service

I, the undersigned attorney for plaintiffs and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33 I have caused to be served true and correct copies of the foregoing "Brief for Planned Parenthood of Central Missouri, a Missouri corporation, David Hall, M.D., and Michael Freiman, M.D., Appellants and Cross-Appellees," upon each party required to be so served, by depositing said copies in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to The Honorable John C. Danforth, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri 65101 and to the Honorable J. Brendan Ryan, Circuit Attorney of the City of St. Louis, Missouri, 1320 Market Street, St. Louis, Missouri 63103.

Frank Susman
Susman, Schermer, Willer & Rimmel
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
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APPENDIX

CHRISTOPHER S. BOND
GOVERNOR

MISSOURI
DEPARTMENT OF SOCIAL SERVICES

DIVISION OF HEALTH
BROADWAY STATE OFFICE BUILDING
P O BOX 570
JEFFERSON CITY
65101

LAWRENCE L. GRAHAM
DIRECTOR
DEPARTMENT OF SOCIAL SERVICES

HERBERT R. DOMKE, M.D., DR.P.H.
DIRECTOR
MISSOURI DIVISION OF HEALTH

January 10, 1975

Dear Hospital or Clinic Director:

House Bill 1211 passed by the 77th General Assembly requires all induced abortions be reported to the Division of Health on forms provided by the Division. Enclosed is a supply of induced abortion forms, instruction manual, and self-addressed envelopes. The forms should be returned to the Division of Health at least monthly by the 15th day of the following month.

The census tract coding directories required to fill out the census tract code will be provided at a later date. The census tract space may be left blank until the directories are available.

Any questions regarding the required abortion form or need for additional supplies can be addressed to Mr. Charles Bell, Director, Bureau of Vital Records, Missouri Division of Health, P.O. Box 570, Jefferson City, Missouri 65101.

Sincerely,

Garland Land

Garland Land, Director
Missouri Center for Health Statistics

GL:vg

Enc.

1/1/75

INSTRUCTION FOR COMPLETING
MISSOURI INDUCED ABORTION FORM

INTRODUCTION

This handbook is designed to assist those responsible for the completion of the induced abortion form. The Missouri Division of Health of the Department of Social Services has the responsibility under House Bill 1211 of the 77th General Assembly, 1974, to promulgate forms for the reporting of induced abortions. Section 10 of House Bill 1211 is as follows:

> "1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.
>
> "2. The forms shall be provided by the state division of health.
>
> "3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers."

STANDARDS FOR COMPLETING THE INDUCED ABORTION FORM

A. Use the current form provided by the Missouri Division of Health.

B. Type all entries whenever possible. If a typewriter is not used, print legibly in dark ink.

C. Complete all items or attach a note explaining any omissions.

D. Do not make alterations or erasures.

E. Do not submit carbon copies, reproductions or duplicates for filing.

F. Use abbreviations only when space on form is inadequate for complete entry.

G. Refer problems not covered in these instructions to the State Bureau of Vital Records.

H. Return all completed induced abortion forms for a month by the 15th of the next month to the Bureau of Vital Records, Missouri Division of Health, P.O. Box 570, Jefferson City, Missouri 65101.

SPECIFIC INSTRUCTIONS FOR
COMPLETING THE INDUCED ABORTION FORM

2. FACILITY NAME

Enter the full name of the hospital or clinic where the abortion took place.

3a. LOCATION - CITY

Enter the name of the city where the abortion took place.

3b. LOCATION - COUNTY

Enter the name of the county where the abortion took place.

4. ATTENDING PHYSICIAN

Enter the name of the physician who performed the abortion.

5. PHYSICIAN ADDRESS

Enter the address of the physician who performed the abortion.

6. PHYSICIAN LICENSE NUMBER

Enter Missouri state license number of the physician who performed the abortion.

7a. USUAL PLACE OF RESIDENCE - CENSUS TRACT

Enter the census tract number where the patient actually resides through the use of census tract coding directories provided by the Missouri Center for Health Statistics. Coding directories have been prepared for all cities greater than 15,000 population. If the patient lives in a city smaller than 15,000 population, leave blank.

7b. USUAL PLACE OF RESIDENCE - CITY

Enter the name of the city, town, or location where the patient actually resides. See NOTE under item 7e. which follows for explanation of "residence."

7c. INSIDE CITY LIMITS

Enter "yes" if the patient resides inside the boundaries of an incorporated city, town, or location mentioned in 7b. Otherwise, enter "no."

7d. COUNTY

Enter the name of the county where the patient actually resides. See NOTE under item 7e. which follows for explanation of "residence."

7e. STATE

Enter the name of the State in which the patient actually resides. This may differ from the State used in the patient's Post Office address.

NOTE: Patient's residence is the place where she lives. This is not necessarily the same as her "Home State," "Voting Residence," or "Legal Residence." Never enter a temporary residence such as one used during a visit, business trip, or a vacation. Residence for a short time at the home of a relative, friend, or home for unwed mothers for the purpose of awaiting the birth of a child is considered to be temporary and should not be entered here. Place of residence during a tour of military duty or during attendance at college is not considered as temporary.

7f. ZIP CODE

Enter the zip code of the city mentioned in item 7b.

8. PATIENT NUMBER

Enter the medical record or clinic number of the patient who had the abortion.

9. BIRTH DATE

Enter the birth date of the patient. If the birth date is unknown, enter the age.

10. RACE

Enter a check in the box indicating the race of the patient. The category "white" includes Mexican American. The category "black" includes negro and Afro American. The "other" category includes American Indian, Chinese, Japanese, Korean, Filipino, Hawaiian, etc. If the "other" category is checked, specify the race.

11. MARITAL STATUS

Enter a check in the box indicating the marital status of the patient at the time of the abortion. If a marriage has been annulled, check "never married."

12. EDUCATION

Enter the number of the highest grade completed in "regular" schooling in the space for elementary school, high school or college.

NOTE: Do not enter any other kind of schooling or training. While beauty and barber schools; business or trade schools, and the like, are important, they are not considered "regular" schools for the purpose of this item.

13. DATE OF THIS ABORTION

Enter the date (month, day, year) that the abortion was performed on this patient.

14. DATE LAST NORMAL MENSES BEGAN

Enter the exact date (month, day, and year) of the beginning of the patient's last normal menstrual period. If the exact day is unknown, but the month and year are known, obtain an estimate of the day from the patient or enter only the month and year. Enter "unknown" if the date cannot be determined.

15. ESTIMATED GESTATIONAL AGE IN WEEKS

Enter the physician's estimate of the length of gestation in weeks as estimated by uterine size prior to performance of abortion.

16. PROVISION FOR FOLLOWUP

Check the box "yes" or "no" indicating whether or not provisions have been made for the patient to be followed up by the physician following the abortion.

17. NUMBER OF LIVING CHILDREN

Enter the number of children born alive to this patient who are still living at the time of this abortion. Enter zero if the patient does not have any living children.

18. NUMBER BORN ALIVE NOW DEAD

Enter the number of children born alive to this patient who are no longer living at the time of this abortion. Enter zero if there has been no children born alive to the patient who are now dead.

19. NUMBER OF FETAL DEATHS

Enter the number of previous pregnancies that did not result in a live born infant due to a miscarriage, stillbirth, or spontaneous abortion. Do not include any previously induced abortions. Enter zero if this is the first pregnancy for this patient or if all previous pregnancies resulted in live born infants or were terminated through induced abortions.

20. NUMBER OF PREVIOUS INDUCED ABORTIONS

Enter the number of previous pregnancies that did not result in a live born infant due to an induced abortion. Enter zero if this is the first pregnancy for this patient or if all previous pregnancies resulted in live born infants or stillbirths.

21. METHOD OF ABORTION

Check the procedure used in performing the abortion.

22. IMMEDIATE COMPLICATIONS

Specify any complications that occurred before the patient left the hospital or clinic.

Department of Social Services
MISSOURI DIVISION OF HEALTH

REPORT OF INDUCED ABORTION

1.

FACILITY INFORMATION

FACILITY NAME	CITY	COUNTY
2.	3a.	3b.
ATTENDING PHYSICIAN	PHYSICIAN ADDRESS	PHYSICIAN LICENSE NUMBER
4.	5.	6.

PATIENT INFORMATION

USUAL PLACE OF RESIDENCE – CENSUS TRACT	CITY	INSIDE CITY LIMITS ☐ Yes ☐ No
7a.	7b.	7c.
COUNTY	STATE	ZIP CODE
7d.	7e.	7f.

PATIENT NUMBER	RACE	MARITAL STATUS	EDUCATION – Specify highest grade completed
8.	☐ 1 White ☐ 2 Black ☐ 9 Other – (Specify) _____	☐ 0 Never Married ☐ 1 Married ☐ 2 Widowed ☐ 3 Divorced ☐ 4 Separated	Elementary or High School (1-12) _____ College (13-17+) _____
BIRTH DATE (MONTH, DAY, YEAR)			
9.	10.	11.	12.

MEDICAL INFORMATION

DATE OF THIS ABORTION (MONTH, DAY, YEAR)	DATE LAST NORMAL MENSES BEGAN (MONTH, DAY, YEAR)	ESTIMATED GESTATIONAL AGE IN WEEKS	HAS PROVISION BEEN MADE FOR FOLLOWUP WITH PT. ☐ Yes ☐ No
13.	14.	15.	16.
NUMBER OF LIVING CHILDREN	NUMBER BORN ALIVE NOW DEAD	NUMBER OF FETAL DEATHS	NUMBER OF PREVIOUS INDUCED ABORTIONS
17.	18.	19.	20.

METHOD OF ABORTION

- ☐ 1 Suction Curettage
- ☐ 2 Sharp Curettage
- ☐ 3 Injection of Prostaglandin
- ☐ 4 Hysterotomy
- ☐ 5 Hysterectomy
- ☐ 6 Other (Specify) _____

21.

SPECIFY ANY IMMEDIATE COMPLICATIONS:

RETURN MONTHLY REPORT TO
BUREAU OF VITAL RECORDS
MISSOURI DIVISION OF HEALTH
DEPT. OF SOCIAL SERVICES
P. O. BOX 570
JEFFERSON CITY, MO 65101

INDUCED PREGNANCY TERMINATION REPORT

FACILITY NAME _____
STREET ADDRESS _____
CITY _____ ZIP CODE _____
County _____

MISSOURI PHYSICIAN LICENSE NUMBER | PHYSICIAN'S INITIALS

PATIENT INFORMATION

Do Not Write In This Space	Patient Number	City of Residence	Inside City Limits Specify Yes or No	County of Residence	State of Residence (abbreviation)	Zip Code	Age	Race (Check One)	Marital Status (Check One)	Education – Specify Highest Grade Completed
								(1) White (2) Black (9) Other	(0) Never Married (1) Married (2) Widowed (3) Divorced (4) Separated	

MEDICAL INFORMATION

Date of Abortion mo./Day/Year	Date Last Normal Menses Began mo./Day/Year	Estimated Gestational Age in Weeks	Number of Living Children	Number of Children Born Alive Now Dead	Number of Fetal Deaths	Number of Previous Induced Abortions	Method of Abortion (Check One)	Complications Within 48 Hours (Check All Applicable)
							(01) Suction Curettage (02) Sharp Curettage (03) Injection of Prostaglandin (04) Hysterotomy (05) Hysterectomy (06) Other (specify on back)	(01) None (02) Hemorrhage (03) Uterine Perforation (04) Cervical Laceration (05) Infection (07) Retained Products (09) Other (specify on back)

DATE COMPLETED

NAME AND TITLE OF PERSON COMPLETING REPORT

Supreme Court, U. S.
FILED
JAN 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1976

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D., Appellants,

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, Appellees.

No. 74-1419

JOHN C. DANFORTH, Attorney General of the State of Missouri, Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

BRIEF

Of John C. Danforth, Attorney General of Missouri

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I. The trial court properly declared constitutional the definition of viability contained in Section 2(2) of House Bill No. 1211, because:

A. The definition of viability contained in House Bill No. 1211 conforms with the definition adopted by this Court in Roe v. Wade and reasonably identifies that stage of pregnancy when the interest of the state in protecting potential human life becomes compelling 23

B. The definition of viability contained in House Bill No. 1211 does not unduly interfere with the abortion decision or its effectuation 24

II. The district court properly declared constitutional Section 3(2) of House Bill No. 1211, because requiring that the patient consent in writing constitutes a reasonable means by which the state can assure that a woman's decision to terminate her pregnancy is informed and voluntary 30

III. The trial court properly declared constitutional Section 3(3) of House Bill No. 1211, because requiring spousal consent constitutes a reasonable means of furthering the long-standing interest of the State of Missouri in promoting the stability and protecting the integrity of the institution of marriage ... 34

IV. The district court properly declared constitutional Section 3(4) of House Bill No. 1211, because requiring the consent of a parent or person in loco parentis constitutes a reasonable means of furthering the state's long-standing interest in protecting minors, supporting parents in the discharge of their responsibilities and promoting the stability of the family unit 41

V. The district court erred in holding unconstitutional Section 6(1) of House Bill No. 1211, because:

A. The first sentence of Section 6(1) does not require physicians to employ abortion techniques designed to assure live delivery of the fetus 48

B. Assuming arguendo that this court concludes that the first sentence of Section 6(1) requires physicians to employ abortion techniques designed to assure live delivery of a fetus, that sentence is severable from the remainder of the section 53

VI. The district court properly declared constitutional Section 7 of House Bill No. 1211, because terminating parental rights constitutes a reasonable means of furthering the compelling interest of the State of Missouri in protecting actual life 54

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A. The Missouri General Assembly reasonably determined that saline amniocentesis is deleterious to maternal health 57

B. Prohibiting saline amniocentesis constitutes a reasonable means of furthering the State of Missouri's compelling interest in protecting maternal health 62

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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1976

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D., Appellants,

vs.

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No. 74-1419

JOHN C. DANFORTH, Attorney General of the State of Missouri, Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

BRIEF

Of John C. Danforth, Attorney General of Missouri

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Missouri, Eastern Division, in *Planned Parenthood of Central Missouri, et al. v. John C. Danforth, Attorney General of the State of Missouri, et al.*, is reported at 392 F.Supp. 1362 (E.D. Mo. 1975).

JURISDICTION

On January 31, 1975, the United States District Court for the Eastern District of Missouri, Eastern Division, entered an "Order, Judgment and Decree" declaring unconstitutional Section 6(1) of House Bill No. 1211, and granting an injunction against the enforcement thereof. On February 6, 1975, appellant John C. Danforth filed a "Motion to Alter or Amend Judgment," which was denied by the district court on February 12, 1975. Appellant John C. Danforth filed his Notice of Appeal in the United States District Court for the Eastern District of Missouri, Eastern Division, on March 14, 1975.

Jurisdiction of this Court in Cause Number 74-1419 is predicated upon 28 U.S.C. Section 1253, which authorizes a direct appeal from the order of a three-judge court declaring a state statute unconstitutional and enjoining enforcement thereof. Appellants challenge the jurisdiction of this Court in Cause No. 74-1419 (Appellants' Brief at 17-18), contending that the injunctive relief granted by the district court was "unwarrantedly and improvidently granted." In view of the fact that appellants requested a temporary restraining order, preliminary injunction and permanent injunction to restrain all challenged sections of House Bill No. 1211, they cannot be heard to complain.

THE STATUTE INVOLVED

House Committee Substitute for House Bill No. 1211, enacted in 1974 by the Seventy-Seventh General Assembly, Second Regular Session, has not yet been printed in the Missouri Revised Statutes. However, the text of House Bill No. 1211 can be found in the 1975 Appendix Pamphlet to Vernon's Annotated Missouri Statutes.

In its entirety, House Bill No. 1211 provides as follows:

H.C.S. House Bill No. 1211

AN ACT relating to abortion with penalty provisions and emergency clause.

Be it granted by the General Assembly of the State of Missouri, as follows:

SECTION 1. It is the intention of the general assembly of the state of Missouri to reasonably regulate abortion in conformance with the decisions of the supreme court of the United States.

SECTION 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:

(1) **"Abortion",** the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) **"Viability",** that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;

(3) **"Physician",** any person licensed to practice medicine in this state by the state board of registration of the healing arts.

SECTION 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment.

(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and

that her consent is informed and freely given and is not the result of coercion.

(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.

(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

SECTION 4. No abortion performed subsequent to the first twelve weeks of pregnancy shall be performed except where the provisions of section 3 of this act are satisfied and in a hospital.

SECTION 5. No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.

SECTION 6. (1) No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo.

(2) Whoever, with intent to do so, shall take the life of a premature infant aborted alive, shall be guilty of murder of the second degree.

(3) No person shall use any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive.

SECTION 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411, RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.

SECTION 8. Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 7 of this act by the attending physician and the woman shall certify in writing that she has been so informed.

SECTION 9. The general assembly finds that the method or technique of abortion known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy.

SECTION 10. 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of rele-

vant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

2. The forms shall be provided by the state division of health.

3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

SECTION 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years.

SECTION 12. Any practitioner of medicine, surgery, or nursing, or other health personnel who shall willfully and knowingly do or assist any action made unlawful by this act shall be subject to having his license, application for license, or authority to practice his profession as a physician, surgeon, or nurse in the state of Missouri rejected or revoked by the appropriate state licensing board.

SECTION 13. Any physician or other person who fails to maintain the confidentiality of any records or reports required under this act is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

SECTION 14. Any person who contrary to the provisions of this act knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action required by this act shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

SECTION 15. Any person who is not a licensed physician as defined in section 2 of this act who performs or attempts to perform an abortion on another as defined in subdivision (1) of section 2 of this act, is guilty of a felony, and upon conviction, shall be imprisoned by the department of corrections for a term of not less than two years nor more than seventeen years.

SECTION 16. Nothing in this act shall be construed to exempt any person, firm, or corporation from civil liability for medical malpractice for negligent acts or certification under this act.

SECTION A. Because of the necessity for immediate state action to regulate abortions to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

SECTION B. If any provision of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity does not affect the provisions or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Approved June 14, 1974.

Effective June 14, 1974.

QUESTIONS PRESENTED

I. Section 2(2) of House Bill No. 1211 defines viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural

or artificial life-supportive systems." The questions presented are:

A. Whether "viability," as defined in Section 2(2), conforms with the definition adopted by this Court in *Roe v. Wade*, 410 U.S. 113 (1973); and

B. If not, whether "viability," as defined in Section 2(2), interferes with the right of women to terminate their pregnancies as enunciated in *Roe v. Wade*, 410 U.S. 113 (1973).

II. Section 3(2) of House Bill No. 1211 provides that an abortion shall not be performed unless the patient certifies in writing that she consents to the abortion, and that her consent is informed and voluntary. The question presented is:

A. Whether Section 3(2) constitutes a reasonable means by which the State of Missouri can assure that a woman's decision to terminate her pregnancy is informed and voluntary.

III. Section 3(3) of House Bill No. 1211 provides that no abortion shall be performed on a married woman without the written consent of her husband, unless the abortion is necessary to preserve the life of the woman. The question presented is:

A. Whether Section 3(3) constitutes a reasonable means of furthering the long-standing interest of the State of Missouri in promoting the stability and protecting the integrity of the institution of marriage.

IV. Section 3(4) of House Bill No. 1211 provides that no abortion shall be performed on an unmarried woman under the age of eighteen without the written consent of one parent or a person *in loco parentis*, unless the abortion is necessary to preserve the life of the woman. The question presented is:

A. Whether Section 3(4) constitutes a reasonable means of furthering the long-standing interest of the State of Missouri in protecting minors, supporting parents in the discharge of their responsibilities and promoting the stability of the family unit.

V. Section 6(1) of House Bill No. 1211 imposes upon physicians an affirmative duty to take reasonable measures to sustain the lives of fetuses who survive the abortion procedure. The questions presented are:

A. Whether the first sentence of Section 6(1) requires that physicians employ abortion procedures designed to assure live delivery of the fetus; and

B. If so, whether the first sentence of Section 6(1) is severable from the remainder of the section.

VI. Section 7 of House Bill No. 1211 provides that any fetus who survives an elective abortion procedure shall become a ward of the state, and the rights of parents who consented to the abortion procedure shall be terminated as provided in Missouri's Juvenile Code, Chapter 211, RSMo. 1969, as amended. The question presented is:

A. Whether termination of parental rights after a fetus survives an elective abortion procedure constitutes a reasonable means of furthering the compelling interest of the State of Missouri in protecting human life.

VII. Section 9 of House Bill No. 1211 prohibits the use of a procedure known as "saline amniocentesis" following the first 12 weeks of pregnancy. The questions presented are:

A. Whether the Missouri General Assembly reasonably determined that saline amniocentesis is deleterious to maternal health; and

B. Whether prohibiting the use of saline amniocentesis constitutes a reasonable means of furthering the compelling interest of the State of Missouri in protecting maternal health.

VIII. Sections 10 and 11 of House Bill No. 1211 provide for the promulgation of rules, regulations and forms for the purpose of compiling medical data relating to abortion procedures. The question presented is:

A. Whether Sections 10 and 11 unduly interfere with the abortion decision or its effectuation.

STATEMENT OF THE CASE

In January of 1973, this Court declared unconstitutional the criminal abortion statutes of Texas and Georgia in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 197 (1973). Several cases then pending before this Court were remanded for reconsideration, including *Rodgers v. Danforth*, 410 U.S. 949 (1973), wherein Missouri's former criminal abortion statutes were challenged as unconstitutional. A three-judge federal court in the Western District of Missouri declared the Missouri statutes unconstitutional, and that court's judgment was affirmed on appeal. *Danforth v. Rodgers*, 414 U.S. 1035 (1973).

After two legislative sessions, the Seventy-Seventh Missouri General Assembly, Second Regular Session, enacted House Committee Substitute for House Bill No. 1211 (hereinafter referred to as "House Bill No. 1211" or "Missouri abortion law"), for the stated purpose of regulating abortions within the parameters defined in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973).

On June 14, 1974, the Honorable Christopher S. Bond, Governor of the State of Missouri, signed into law House Bill No.

1211, which became effective immediately by reason of an emergency clause. On June 17, 1974, Planned Parenthood of Central Missouri, David Hall, M.D., and Michael Freiman, M.D. (hereinafter "plaintiffs") filed suit seeking a declaratory judgment and injunctive relief to restrain the operation of House Bill No. 1211, alleging that facially and as applied, the newly enacted Missouri abortion law was unconstitutional.

In their application for a temporary restraining order and in their argument presented in support thereof, plaintiffs challenged specifically only Sections 2(2), 6(1), 7 and 9. (Memorandum of Plaintiffs in Support of Prayer for Temporary Restraining Order, filed June 17, 1974.) At the show cause hearing for a preliminary injunction held on June 24, 1974, plaintiffs expanded their challenges to include Sections 3(3) and 3(4). During the deposition of plaintiff Michael Freiman, M.D., on July 3, 1974, Sections 3(2), 10 and 11 were added to plaintiffs' list of challenged sections. On July 18, 1974, several days before the evidentiary hearing was scheduled to commence, plaintiffs advised defendant of their intention to challenge in addition Sections 5, 6(3) and 8, and on July 19, 1974, plaintiffs added Section 4 to the list.

At the commencement of trial on July 22, 1974, defendant moved for a continuance in order to prepare evidence and arguments on the expanding list of challenged sections. His motion was sustained with respect to Sections 4, 5, 6(3) and 8 (R. 2-11). On July 22 and 23, 1974, evidence was heard on the remaining sections designated by plaintiffs in the pretrial proceedings. After defendants rested and plaintiffs declined rebuttal, the district court continued the cause until September 16, 1974, for the purpose of hearing evidence on Sections 4, 5, 6(3) and 8. Thereupon, counsel for plaintiffs withdrew the challenge to said sections. (R. 377-378.)

On January 31, 1975, the three-judge federal district court filed its "Order, Judgment and Decree" upholding the constitu-

tionality of Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11, and denying plaintiffs' request for an injunction against enforcement of those sections. In addition, the court declared Section 6(1) unconstitutional, and granted an injunction against its enforcement. On February 5, 1975, plaintiffs filed their Notice of Appeal to this Court. On February 6, 1975, John C. Danforth, hereinafter "defendant," filed a "Motion to Alter or Amend Judgment," with suggestions in support thereof, which motion was denied by the court on February 12, 1975. On March 14, 1975, defendant filed his Notice of Appeal to this Court.

On or about February 10, 1975, plaintiffs filed a "Motion for Stay of Application and Enforcement of Statute, Pending Appeal to the United States Supreme Court, and Authorities in Support Thereof." Although only Sections 2(2), 3(3), 3(4), 6(1), 7, 9, 10 and 11 were challenged at trial, (R. 2-11, 377-378), this Court stayed enforcement of House Bill No. 1211 on February 18, 1975.

On or about March 12, 1975, plaintiffs filed their Jurisdictional Statement in Cause Number 74-1151. On April 9, 1975, defendant John C. Danforth filed a letter with the Court agreeing with plaintiffs that the questions presented were so substantial as to require plenary consideration with briefs on the merits and oral argument. Thereafter, on May 13, 1975, defendant John C. Danforth filed his Jurisdictional Statement in Cause Number 74-1419. On or about May 29, 1975, plaintiffs filed their Motion to Affirm the judgment of the district court. On October 6, 1975, this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

I. Definition of Viability

A. In *Roe v. Wade*, 410 U.S. 113 (1974), this Court described a viable fetus as one "potentially able to live outside the mother's womb, albeit with artificial aid." 410 U.S. at 160. Section 2(2) defines viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." Accordingly, the definition of viability contained in House Bill No. 1211 conforms with the definition adopted by this Court and reasonably identifies that stage during gestation when the interest of the state of Missouri in protecting potential human life becomes compelling.

B. Because viability varies with each patient, there is no consensus among the medical community as to when viability occurs. All medical witnesses who testified at trial agreed that physicians are capable of ascertaining, with reasonable medical certainty, whether a fetus is viable as that term is defined in Section 2(2) of House Bill No. 1211. Section 2(2) authorizes the physician to make this determination in the exercise of his medical judgment. A mistaken determination of non-viability does not subject the physician to criminal or civil liability. Therefore, the absence of an objective standard of viability does not chill the effectuation of a woman's decision to terminate a pregnancy.

II. Patient-Consent Requirement

In enunciating the right of women to terminate their pregnancies, this Court in *Roe v. Wade*, 410 U.S. 113 (1973), contemplated that her decision would be made in consultation

with her physician. As the evidence at trial demonstrated, in reality there is frequently no opportunity for the woman to consult with a physician for the purpose of determining whether pregnancy termination is in *her* best interest. Many abortions are performed in out-patient clinics and teaching hospitals and not by the woman's regular physician. Often the woman does not even meet the physician until she arrives at the clinic for her abortion. Whatever counseling takes place may be performed by nonmedical personnel with no special skill, training or experience.

The evidence below also demonstrated that it is very stressful on a woman to consider terminating her pregnancy and the decision to do so is frequently quite tenuous. Yet the circumstances confronting the woman dictate that the decision be hurriedly made and executed. Further, the woman may be exposed to pressures from others who may impel her improvidently to terminate her pregnancy.

By requiring that the woman consent in writing to the abortion the State seeks to formalize the decision-making process, to increase the woman's opportunity to reflect upon a serious decision and to enable her to recognize that in the final analysis only she can decide to terminate her pregnancy.

Requiring that the patient consent to an abortion neither impedes the abortion decision nor imposes a burden on physicians because it is universal medical practice to secure the patient's consent to all surgical procedures. Even prior to enactment of House Bill No. 1211, Missouri physicians did not perform abortions without first obtaining their patients' informed and written consent. For these reasons, Section 3(2) constitutes a reasonable means by which the state can assure that the woman's decision to terminate her pregnancy is informed and voluntary.

III. **Spousal Consent**

Section 3(3) furthers a compelling interest of the state of Missouri not considered in *Roe v. Wade* or *Doe v. Bolton*. That interest is in promoting the stability and in protecting the integrity of the institution of marriage.

This Court has long recognized that marriage is a status which is regulated by the state. Legislatures enact laws defining the obligations and liabilities of marriage and proscribing those activities which are deleterious to marriage. Criminal statutes, including those relating to adultery and bigamy, restrict the absolute freedom of an individual for the sake of protecting the marital unit.

It is inherent in the status of marriage that certain decisions must be made jointly by husband and wife, or not made at all. Especially, this is true with respect to the bearing and raising of children. Procreation can be prevented by one party to the marriage. However, the decision to change the family status and to have children is normally made jointly by husband and wife. A number of statutes recognize that joint decisions are inherent in the status of marriage. Statutes provide that the decision to place a child for adoption must be made jointly if the parents are married. Moreover, statutes governing artificial insemination and sterilization require agreement by husband and wife. Typically, spousal consent is required for the disposition of property.

The Missouri General Assembly properly found that Section 3(3) was a reasonable and necessary means of protecting the institution of marriage against unilateral decision making by the wife.

IV. **Parental Consent**

Section 3(4) of House Bill No. 1211 extends to the area of abortion traditional state measures designed to protect minors

from the consequences of improvident decisions and to support parents in the discharge of their familial responsibilities. As the evidence below demonstrated, the abortion decision is stressful, but it must be hurriedly made and executed. Many abortions are performed in out-patient clinics and teaching hospitals rather than by the patient's regular physician. Counseling is performed largely by lay volunteers with no particular skill, experience or competence in assisting the minor to make an informed decision.

Implementation of Section 3(4) imposes no additional burden upon physicians, for even prior to enactment of House Bill No. 1211 physicians required parental consent before they would perform an abortion on a minor. The grave considerations inherent in the abortion decision and the manner in which abortion services are provided require that the pregnant minor receive the sensitive guidance of an adult who has a particular concern for her welfare. For these reasons, Section 3(4) constitutes a reasonable means of furthering the State's interest in protecting the welfare of minors and in supporting parents in the discharge of their responsibilities to their children.

V. **Standard of Care**

A. The district court erroneously interpreted the first sentence of Section 6(1) of House Bill No. 1211 as establishing a standard of care applicable to physicians during the abortion procedure. The court's interpretation is not supported by the language of the provision, the legislative history of House Bill No. 1211, or the testimony of the principal sponsor of the statute.

Properly interpreted, Section 6(1) applies only after an abortion has been performed and a live fetus results. When that occurs, physicians have an affirmative duty to take measures to encourage or to sustain the life of the fetus who survived the

abortion procedure. The state has a compelling interest in protecting human life. *Roe v. Wade*, 410 U.S. 113, 160-163 (1973). Section 6(1) constitutes a reasonable means of protecting actual human life.

To resolve the challenge to this section requires construction of the language used by the Missouri General Assembly. Under defendant's interpretation, Section 6(1) is constitutional; under plaintiffs' interpretation it is not. Accordingly, this Court should abstain from construing Section 6(1) and refer plaintiffs to Missouri courts for resolution of this issue. In the alternative, if this Court reaches the merits and concludes that the first sentence of Section 6(1) is unconstitutional, that sentence can be severed from the remainder of the section, for it was the clear intent of the Missouri General Assembly to declare as manslaughter the failure to encourage or to sustain the life of a fetus who survives an abortion.

VI. **Termination of Parental Rights**

The state has a compelling interest in protecting actual life surviving an abortion. *Roe v. Wade*, 410 U.S. 113 (1973). Section 7 of House Bill No. 1211 furthers this interest by transferring to the State custody of a child who survives an elective abortion. Inherent in the decision to abort is a threat to the future well-being of the child, which the legislature reasonably believed required termination of parental rights.

If parents who consented to the abortion change their mind and want the child after all, they can regain custody. Section 7 provides for the termination of their rights in accordance with Section 211.441, RSMo 1969. An order for termination entered pursuant to that section is not final for one year thereafter. During that period, therefore, parents may petition the court to grant them custody on the ground that they are fit parents.

VII. **Prohibition of Saline Amniocentesis**

A. The state has a compelling interest in protecting maternal health, *Roe v. Wade*, 410 U.S. 113 (1973), and may adopt reasonable regulations in furtherance of that interest applicable after the first trimester of pregnancy. On the basis of medical evidence and testimony, the Missouri General Assembly determined that a mid-trimester abortion procedure, known as saline amniocentesis, is deleterious to maternal health. Accordingly, they prohibited use of that procedure after the first trimester.

The medical testimony and exhibits presented at trial amply support the finding that saline amniocentesis is deleterious to maternal health. Further, the evidence below demonstrated the availability of alternative procedures for mid-trimester abortion, some of which are safer than saline amniocentesis. Section 9 constitutes a reasonable measure in furtherance of the State's compelling interest in protecting maternal health.

Missouri's prohibition of the more dangerous of two alternative mid-trimester abortion procedures was based on competent medical evidence, and this Court should defer to the finding of the Missouri General Assembly. Further, the prohibition of saline amniocentesis does not impermissibly limit physicians in the practice of their profession, for they have no constitutionally protected right to practice medicine free from governmental regulation.

VIII. **Record-Keeping and Reporting**

Sections 10 and 11 of House Bill No. 1211 are rationally related to the State's interest in protecting the health of its citizens. These provisions have no impact on the woman's decision to terminate her pregnancy, they do not impair the privacy of the physician-patient relationship, and they impose no undue burden on physicians in the practice of their profession.

ARGUMENT

Introduction

A. **The History of House Bill No. 1211**

Roe v. Wade, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973) permitted states to regulate and even proscribe abortion under certain circumstances. The essence of the holdings in those two cases was that: 1) a woman has a qualified right to obtain an abortion; 2) the state's compelling interest in protecting maternal health justifies reasonable regulation of abortion procedures and facilities after the first twelve weeks of pregnancy; and 3) the state's compelling interest in potential human life justified prohibition of abortions after viability, except when necessary to preserve the life or health of the woman.

House Bill No. 1211, enacted after two legislative sessions of work, constitutes a well-considered and good faith effort by the Missouri General Assembly to follow the guidelines set forth in *Roe v. Wade* and *Doe v. Bolton*. House Bill No. 1211 requires that all abortions be performed by physicians licensed by the state of Missouri; that abortions after the first twelve weeks be performed in hospitals; and that abortions after viability be prohibited except when necessary to preserve the life or health of the mother. Each of these provisions is expressly permitted by *Roe* and *Doe*. Furthermore, exercising the authority granted by *Roe v. Wade* to regulate abortions after the first trimester, the Missouri General Assembly, after considering medical evidence, prohibited saline amniocentesis—one method of mid-trimester abortion—which it found to be dangerous to maternal health.

In addition, the Missouri General Assembly addressed itself in House Bill No. 1211 to several problems not considered by this

Court in *Roe* and *Doe*. Those problems include: (1) spousal consent, (2) parental consent where the woman is an unmarried minor under the age of 18, (3) parental rights where abortion produces a live fetus, and (4) the duty of the physician when abortion produces a live fetus.

B. The Need for an Abortion Statute

Throughout their brief, plaintiffs complain that the Missouri General Assembly has "singled out" abortion "for individualized statutory attention." *See, e.g.*, Plaintiffs' Brief at 37, *et seq*. In response, there are two reasons for the existence of special statutes on abortion.

First, in *Roe v. Wade* and *Doe v. Bolton*, this Court not only created a vacuum in abortion regulation by striking down existing statutes, but also set forth guidelines to be followed by any state legislatures desiring to fill that vacuum by enacting a statute regulating abortion. In response to *Roe* and *Doe*, Missouri enacted a special abortion statute which, among other things, distinguished between the three stages of pregnancy, regulated post first-trimester abortions to protect the health of the woman, and prohibited abortions after viability except to preserve the life or health of the woman.

Second, as a matter of fact abortion is not similar to other surgical procedures.[9] It is *sui generis*, and there is ample authority in the record for this proposition. (*See, e.g.* Widdicombe, R. 145, et seq.) Abortion is distinguishable from other surgical procedures in the following ways: 1) Abortion is frequently elective and not therapeutic. It requires an informed decision by the patient, and is not simply a matter of following the advice of a physician for the sake of preserving one's health. 2) The abortion decision is stressful and tenuous for the woman, and it involves emotional aspects not present in most medical

procedures. 3) Abortions are often performed quickly on a mass production basis at out-patient clinics. Such abortions are not "personalized", and are not the result of ongoing medical consultation. 4) There is no physician-patient relationship in many abortions for the reason that they are performed in a brief period of time at clinics or teaching hospitals by physicians who do not know the patients. 5) As a legal and widely used practice, abortion is a relatively new procedure.

C. Fundamental Issues Are Involved in This Case

In resolving the questions raised in this case, the Court is asked to address itself to fundamental issues which extend far beyond the abortion controversy. Those issues include the right of the legislature to define the obligations and responsibilities of marriage, the rights of children *vis a vis* the responsibilities of parents, and the authority of government to regulate the practice of medicine. In addition, this case concerns the degree to which this Court will substitute its judgment on questions of domestic relations and public health for the judgment of a state legislature.

Stated in their most basic terms, the positions of plaintiffs and defendant on three of the sections which raise problems of tremendous significance beyond abortion can be summarized as follows:

1. **With respect to spousal consent, Section 3(3):**

   Plaintiffs see marriage as the cohabitation of two individuals, each of whom possesses separate individual rights which may be in conflict. For plaintiffs, abortion is a purely personal right of the woman, and the status of marriage can place no limitations on personal rights. Defendant, on the other hand, sees marriage as an institution, the nature of which places limitations on the absolute individualism of

its members. The institution of marriage is protected by law, which defines its obligations and restricts the absolute independence of married persons. Defendant argues that joint decision making is inherent in the institution of marriage, and is insisted upon by legislatures in several areas, including placing a child for adoption, artificial insemination, sterilization and the conveyance of property. Defendant believes that the logical extension of plaintiffs' view of marriage would be to declare unconstitutional all statutes limiting the absolute freedom of a married person. Among these would be statutes prohibiting adultery and bigamy and statutes which require spousal consent before placing a child for adoption, before artificial insemination and before sterilization.

2. **With respect to parental consent, Section 3(4):**

The differences between plaintiffs and defendant on this issue were foreshadowed but not resolved in this Court's opinion and the dissent in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Plaintiffs see minors as enjoying precisely the same rights as adults. They interpret *In re Gault*, 387 U.S. 1 (1967) as meaning that minors must, for all purposes, be treated by the law as adults. Defendant believes that where discretion and decision making are involved, the legislature may properly provide that parental guidance is necessary. Defendant argues that extending procedural fairness to minors in the court system is not the same as vesting minors with the power to make decisions in situations where maturity and judgment are important. The logical extension of plaintiffs' view would be to declare unconstitutional all statutes which limit the freedom of minors to vote, get married, buy liquor and buy and sell property.

3. **With respect to saline amniocentesis, Section 9:**

Plaintiffs insist that a physician has a "right" to practice medicine as he pleases, unencumbered by governmental control over the procedures he uses. Implicit in plaintiffs argument is that the Court should review, in depth, the medical considerations involved, and substitute its judgment for the judgment of the legislature. Defendant states that doctors have no "right" to practice medicine, that federal and state governments have the power to prohibit certain medical practices, and that the court should defer to the judgment of the legislature in weighing the advisibility of specific regulations. Defendant believes that the logical extension of plaintiffs' argument would be to declare unconstitutional all governmental restrictions on the practice of medicine, including those of the Food and Drug Administration.

I

The Trial Court Properly Declared Constitutional the Definition of Viability Contained in Section 2(2) of House Bill No. 1211,[1] because:

A. **The definition of viability contained in House Bill No. 1211 conforms with the definition adopted by this Court in Roe v. Wade and reasonably identifies that stage of pregnancy when the interest of the state in protecting potential human life becomes compelling.**

This Court held in *Roe v. Wade*, 410 U.S. 113 (1973), that the state's interest in protecting potential human life becomes

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[1] Section 2(2) of House Bill No. 1211 provides as follows:

"Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:

* * * * * * *

" 'Viability', that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;"

compelling when the fetus is "viable." 410 U.S. at 163. In furtherance of that compelling interest, the state may restrict or even proscribe abortions after the fetus becomes viable. This Court defined a viable fetus as one "potentially able to live outside the mother's womb, albeit with artificial aid." 410 U.S. at 163.

Section 2(2) of House Bill No. 1211, defines viability as follows:

> ". . . that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems."

A comparison of Section 2(2) with the definition of viability adopted by this Court reveals no material difference. What difference exists in the wording adopted by the Missouri General Assembly would appear to favor plaintiffs. Arguably, that point when the life of the fetus can be "continued indefinitely" (House Bill No. 1211), would occur later in a pregnancy than that point when the fetus is "potentially able to live outside the mother's womb. . . ." (*Roe v. Wade*, 410 U.S. at 160.) Accordingly, the definition of viability challenged herein conforms with that adopted by this Court, and the judgment of the district court declaring it constitutional should be affirmed.

B. **The definition of viability contained in House Bill No. 1211 does not unduly interfere with the abortion decision or its effectuation.**

No evidence adduced at trial supports plaintiffs' conclusory allegations that the definition of viability contained in Section 2(2) of House Bill No. 1211 interferes with their right to practice medicine[2] or with the right of women to obtain abortions.

[2] Throughout their brief plaintiffs assert a "right to practice medicine." Defendant submits that doctors have no right to practice medicine as they see fit, free of governmental regulation. The only right to practice medicine possessed by physicians relevant to the issues herein is derivative of the woman's right to terminate a pregnancy.

Indeed, plaintiff Hall agreed with the definition of viability challenged herein:

> "Section 2, paragraph 2: My only comment here is that although I agree with the definition of 'viability' I think that it must be understood that viability is a very difficult state to assess. And that the exact art of medicine makes it difficult to be sure at exactly how many weeks a pregnancy exists at any given point in time." (Deposition of plaintiff Hall, a portion of which was read into evidence, R. 369.)

The evidence adduced below established that the length of pregnancy is determined by counting from the first day of the last menstrual period (Warren, R. 14), based on the medical history provided by the patient (Klaus, R. 277). Fetal or uterine size can be measured by palpitation of the uterus (Anderson, R. 355), or by ultrasound (Anderson, R. 355; Warren, R. 18). The probability of fetal survival *ex utero* at a given gestational age is plotted on charts commonly used by obstetricians and gynecologists in the practice of their specialities (Warren, R. 66; Anderson, R. 362; Klaus, R. 277; Def. Ex. F, R. 374 and Def. Ex. N, R. 374). Generally, physicians would agree that viability may occur at twenty-six to twenty-eight weeks (Warren, R. 68; Kerenyi, R. 92; Anderson, R. 356).

Plaintiffs maintain that Section 2(2) is unconstitutional because: 1) it attempts to define viability, thereby interfering with the professional judgment of physicians (Plaintiffs' Brief at 67-68, 70); 2) it fails to define viability by reference to a specific gestational age, thereby offering no guidance to the physician who seeks to avoid engaging in criminal conduct (Plaintiffs' Brief at 65-67, 70); and 3) it purports to confer upon physicians the foresight to determine the survivability of a particular fetus,

which is impossible until after the fetus has been expelled or removed from the uterus (Plaintiffs' Brief at 67-68).

Apparently, plaintiffs do not contest the right of states to proscribe abortion after viability. They argue inconsistently that states must define viability by objective standards, but cannot define viability without unconstitutionally interfering with the professional judgment of physicians. In short, it appears to be plaintiffs' position that while the state may proscribe abortions after viability, *Roe v. Wade*, 410 U.S. at 162-164, the state may not define viability.

Defendant submits that Section 2(2) embodies the flexible medical standard contemplated by this Court in *Roe v. Wade*. The determination of when the fetus is viable rests, as it should, with the physician, in the exercise of his medical judgment, on a case-by-case basis. *Wolfe v. Schroering*, 388 F.Supp. 631 (W.D. Ky. 1974). Even plaintiffs' medical witnesses testified that a physician reasonably can estimate whether a fetus is viable on the basis of the duration of the pregnancy and the size of the fetus. (Warren, R. 18; Kerenyi, R. 92.)

Plaintiffs' reliance upon *Wolfe v. Schroering, supra*, is misplaced. Notwithstanding their inference to the contrary, the language quoted at page 65 of plaintiffs' brief prompted the court to *uphold* the challenged definition of viability ("that stage of human development when the life of the unborn child may be continued by natural or life-supportive systems") and the prohibition against aborting fetuses that ". . . may reasonably be expected to have reached viability." *Wolfe v. Schroering*, 388 F.Supp. at 637. Indeed, the court specifically rejected the contention advanced by plaintiffs herein that viability must be defined as occurring no sooner than twenty-four weeks (Plaintiffs' Brief at 65-67, 70). The court acknowledged the references in *Roe v. Wade*, 410 U.S. at 160, to twenty-eight and twenty-four weeks, but noted that viability was also defined as

that time when the fetus "presumably has the capability of meaningful life outside the mother's womb." *Roe v. Wade*, 410 U.S. at 163; *Wolfe v. Schroering*, 388 F.Supp. at 636. The court reasoned that because viability varies, the point at which the state's interest becomes compelling also varies, and the determination of viability must be left to physicians in the exercise of their medical judgment. *Wolfe v. Schroering*, 388 F.Supp. at 636-637.

Plaintiffs also misrepresent the holding in *Hodgson v. Anderson*, 378 F.Supp. 1008 (D. Minn. 1974), app. dismissed, 410 U.S. 903 (1975), by quoting out of context the language of the court (Plaintiffs' Brief, at 63-64). The constitutional defect in the Minnesota statute was the prohibition of abortions when the fetus is "potentially viable," which was defined as the second half of its gestation, or at approximately twenty weeks. The district court concluded that this prohibition effectively proscribed abortions prior to viability and could not be justified as a regulation in furtherance of the state's interest in protecting maternal health. *Hodgson v. Anderson*, 378 F.Supp. at 1012, 1016. Unlike the definition considered in *Hodgson*, Section 2(2) does not fix viability at an arbitrary point in gestation or prohibit abortions prior to viability. Nor has Missouri defined viability expansively, akin to the Utah definition ("any reasonable possibility of survival") declared unconstitutional in *Doe v. Rampton*, 366 F.Supp. 189 (D.Utah 1973). In fact, the original version of House Bill No. 1211 was amended by adding the word "indefinitely" to restrict viability to those cases in which there would be sustained fetal survival (O'Toole, R. 176, 196-197).

Plaintiffs contend Section 2(2) subjects physicians to the risk of criminal prosecution in estimating whether the fetus is viable. Because in their view the definition establishes a standard of "possible evanescent survivability" (Plaintiffs' Brief at 68), which defendant disputes, they argue further that physicians confronted with the threat of prosecution will err on the side of

caution and refuse to perform abortions if there is any remote possibility that the fetus may survive.

House Bill No. 1211 imposes no sanctions on a physician who incorrectly estimates the maturity or viability of the fetus.[3] Section 5, which was *not* challenged by plaintiffs, (R. 2-11, 377-378; Plaintiffs' Brief, at 22), provides that:

> "No abortion not necessary to preserve the life or health of the mother shall be performed *unless the attending physician first certifies with a reasonable medical certainty that the fetus is not viable.*" (Emphasis supplied.)

While the failure to *certify* non-viability may be punishable pursuant to Sections 12 and 14 of House Bill No. 1211, the failure to estimate correctly is not. If the Missouri General Assembly had intended to subject physicians to prosecution for errors in medical judgment, it would simply have prohibited abortions after viability. This they did not do. Instead, the physician need only certify, within a reasonable medical certainty, that the fetus is not viable.

Defendant submits that the conclusion reached in *Wolfe v. Schroering*, 388 F.Supp. at 636, 637, and by the district court below comports with this Court's analysis of the logical and biological justifications for identifying "viability" as the point in gestation when the interest of the state in protecting potential human life becomes compelling. *Roe v. Wade*, 410 U.S. at 150, 160-163. Because viability may vary from patient to patient and with advancements in medical technology, it is essential that physicians make the determination in the exercise of their medical judgment.

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[3] Similarly, under Missouri law physicians are not civilly liable for an honest error in judgment, even if there is an erroneous or mistaken diagnosis. *Brown v. United States*, 419 F.2d 337 (8th Cir. 1970).

While the court in *Planned Parenthood Association v. Fitzpatrick*, 401 F.Supp. 554 (E.D.Pa. 1975), declared unconstitutional a definition of viability similar to Section 2(2) of House Bill No. 1211, the conclusion was predicated upon the fact that there is no consensus among the medical community as to when viability occurs. For precisely that reason the determination must be left to physicians, for state legislatures are in no better position to make that determination. The court did, however, find a consensus among the medical community as to the *method* by which viability can be determined. Defendant submits that provisions like Section 2(2) permit physicians to apply that method and exercise their judgment. To uphold the conclusion reached in *Planned Parenthood Association v. Fitzpatrick, supra,* and mandate that states define viability by reference to a specific point in gestation would result in precisely that "Procrustean bed constructed of legislatively defined facts and circumstances" which plaintiffs' counsel has so poetically described (Plaintiffs' Brief, at 70).

Defendant agrees that "viability" will vary, that it is a difficult state to assess (Hall, R. 369), and that it must be left to the physician's judgment. All medical witnesses who testified at trial agreed that physicians are capable of ascertaining, within a reasonable medical certainty, whether a fetus is viable as that term is defined in Section 2(2) of House Bill No. 1211. Accordingly, plaintiffs' allegations that Section 2(2) contravenes the right of women to obtain abortions and the "right" of physicians to practice their profession are wholly without merit. For these reasons, the judgment of the district court declaring Section 2(2) constitutional must be affirmed.

II

The District Court Properly Declared Constitutional Section 3(2) of House Bill No. 1211[4] Because Requiring That the Patient Consent in Writing Constitutes a Reasonable Means by Which the State Can Assure That a Woman's Decision to Terminate Her Pregnancy Is Informed and Voluntary.

In *Roe v. Wade*, this Court contemplated that a woman's decision to terminate a pregnancy would be made in consultation with her responsible physician. 410 U.S. at 153, 163. By requiring the patient's written consent to an abortion, the Missouri General Assembly seeks to formalize that decision-making process and to assure that the woman's decision is informed and freely given. The evidence adduced at trial demonstrates the necessity for such a measure.

A woman's decision to terminate a pregnancy is stressful and tenuous (Warren, R. 30; Anderson, R. 351, 352). Of necessity, the abortion decision must be hurriedly made and executed. A woman is frequently exposed to conflicting pressures from parents, husband, putative father or peers, who, because of their personal interests, might impel the woman improvidently to terminate her pregnancy. Having recognized the conflicts and pressures inherent in the abortion decision, this Court contemplated that the woman would reach her decision in consultation with her responsible physician. *Roe v. Wade*, 410 U.S. at 153, 163.

A thoughtful dialogue between doctor and patient during which the medical, emotional, psychological and financial ramifi-

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[4] Section 3(2) of House Bill No. 1211 provides as follows: "No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

* * * * * * *

"(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion."

cations of the decision may be thoroughly explored is a laudable ideal. However, many abortions are performed in out-patient clinics such as those operated by Reproductive Health Services, Inc. (5,620 per year, Widdicombe, R. 148), Planned Parenthood of Central Missouri (5 to 6 per week or 44 between May 10, 1974, and July 22, 1974, Davis, R. 140, 135), and in teaching hospitals such as Mount Sinai School of Medicine (several hundred first trimester and 12,000 second trimester abortions in 4 years, Kerenyi, R. 81), and Yale-New Haven Hospital (2,600 in one year, Anderson, R. 350).

Typically, abortion procedures are not performed by the patient's regular physician, and a physician does not counsel the patient. As a matter of fact, the patient frequently does not even meet the physician who will perform the procedure until she arrives at the clinic for her abortion (Widdicombe, R. 158-159; Davis, R. 137-139; Anderson, R. 351). Finally, the physician who performs the abortion spends little time with the patient. For example, at the clinic operated by Reproductive Health Services, Inc., one of the twelve physicians on their roster will perform eight abortions in a period of three and one-half hours (Widdicombe, 159-160). In other words, the physician spends on the average only twenty-six minutes per patient.

Whatever counseling is provided is not performed by the physician, but by volunteers and staff counselors (Davis, R. 137), by "social workers, nurses, psychologists, clergymen, people who have undergraduate and graduate degrees" (Widdicombe, R. 156), or by personnel of Clergy Counselling Service (Anderson, R. 351). There appears to be no requirement that these "counselors" have any special skill, competence or experience, which would help the patient to make what is acknowledged to be a stressful decision. Further, their affiliation with clinics whose primary business is to provide abortions may suggest that they are predisposed to encourage abortions and that they do not have sufficient disinterest to advise patients fairly.

When *Roe v. Wade* was decided, our nation had but limited experience with providing abortion services. Now that abortions are widely available, evidence like that adduced at trial demonstrates the necessity of adopting measures designed to improve the quality of the decision-making process. Defendant submits that the district court properly concluded that the patient-consent requirement serves the state's legitimate interest in assuring that the decision to terminate a pregnancy be informed. *Planned Parenthood v. Danforth*, 392 F.Supp. 1362, 1369 (E.D. Mo. 1975). See also, concurring opinion by Webster, Circuit Judge, at 1374-1375.

The interest of the state in protecting the health and welfare of its citizens justifies reasonable regulations to insure the integrity of a woman's decision to terminate her pregnancy. Plaintiffs presented no evidence at trial demonstrating that implementation of Section 3(2) will prevent the termination of a single pregnancy or impose upon physicians any burden whatsoever.

Although no Missouri statute requires the written consent of a patient to medical treatment, as a matter of fact and as a matter of law, consent of the patient is required for all surgery. Section 3(2) merely codifies the universal practice of the medical profession to obtain the patient's written consent for all surgical procedures (O'Toole, R. 177; Klaus, R. 279-280; Def. Ex. A, R. 70, 374; Def. Ex. B, R. 70, 374; and Def. Ex. C, R. 70, 374). Even prior to enactment of House Bill No. 1211, Missouri physicians did not perform abortions without first obtaining their patients' informed and written consent. (Warren, R. 21, 22, 69; Widdicombe, R. 161-162; Def. Ex. GG, R. 162, 375-376; and Def. Ex. HH, R. 142, 375-376.)

When a woman discovers she is pregnant, the nature of her condition impells haste. In addition to pressures of time, she is frequently subjected to pressures from husband, putative father, parents or peers to persuade her to terminate her

pregnancy. If she tentatively decides to terminate or to consider terminating her pregnancy, she is removed from a familiar medical environment and from her regular physician. She may receive no professional or medical counseling, and the time she spends with the physician who will perform the abortion is insufficient to establish a sound doctor-patient relationship.

The objective of Section 3(2) is only to formalize the decision-making process and to increase the pregnant woman's opportunity to reflect upon a stressful and serious decision. This requirement provides a final moment of introspection and helps the woman recognize that only she can decide to terminate her pregnancy. No one—putative father, husband, parents, peers or physicians—can make that decision for her or compel her to undergo an abortion.

The district court found that the patient-consent requirement constitutes a reasonable measure to serve the legitimate interest of the state in preserving the quality of the woman's decision. Against this finding plaintiffs contend simply that Section 3(2) injects into the physician-patient relationship "suspicion, concern, and doubt by the inference that an uninformed, duressed (sic) or coerced consent may occur in the absence of such certification." (Plaintiffs' Brief at 71.) If plaintiffs' analysis were correct, then the physician-patient relationship has always been in jeopardy, for as previously noted, Section 3(2) merely codifies the universal medical practice for all surgical procedures.

The consent provision contained in Section 3(2) of House Bill No. 1211 reasonably serves the legitimate interest of the State in protecting the health and welfare of its citizens. A statutory requirement for a patient's consent to an abortion does not prevent abortion, does not limit the availability of abortions, does not impair the physician-patient relationship and does not impose any burden on plaintiff-physicians or their patients. For these reasons, the judgment of the district court declaring Section 3(2) constitutional must be affirmed.

III

The Trial Court Properly Declared Constitutional Section 3(3) of House Bill No. 1211,[5] Because Requiring Spousal Consent Constitutes a Reasonable Means of Furthering the Long-Standing Interest of the State of Missouri in Promoting the Stability and Protecting the Integrity of the Institution of Marriage.

Underlying the spousal consent requirement in Section 3(3) is the Missouri General Assembly's perception of marriage as an institution, the nature of which entails joint decision making with respect to major changes in family status. (O'Toole, R. 178-179.) Absent this requirement of spousal consent, nothing would prevent the wife from making a unilateral, even secret decision to change the structure of the family unit with respect to the birth of a child, and perhaps with respect to the future child bearing potential of the marriage.[6]

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[5] Section 3(3) of House Bill No. 1211 provides as follows:

"No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

* * * * * * * *

"(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother."

[6] The court below stated:

"Testimony and exhibits introduced at the trial of the instant case establish that there is a direct relationship between induced abortions and the incidence of infertility, premature and still births resulting from subsequent pregnancies (Dr. Backer, Tr. 219, 222-223, Defts' Exs. V, O, S and T). Infants born prematurely are in turn subject to numerous physical and mental defects (Dr. Backer, Tr. 221-222). We are, therefore, not concerned merely with a husband's interest in seeing that a particular fetus conceived by the partners to the marriage is carried to term. We are also confronted with the fact that the decision of whether or not to abort one pregnancy may have a profound effect on the future reproductive capacity of the marriage." *Planned Parenthood v. Danforth*, 392 F. Supp. at 1370.

Historically, this Court has viewed the institution of marriage as more than the cohabitation of two atomistic individuals, each pursuing his or her separate rights. In *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), the Court said:

> "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

This Court has recognized the public interest in protecting the institution of marriage and the authority of legislatures to regulate its obligations and liabilities. *Maynard v. Hill*, 125 U.S. 190 (1888), *Reynolds v. United States*, 98 U.S. 145 (1878). In *Maynard v. Hill*, the Court said of the marriage relationship:

> "The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and society, without which there would be neither civilization nor progress." 125 U.S. at 211.

In regulating the status and obligations of marriage, legislatures traditionally have placed limitations on what would, absent marriage, be permissible individual conduct. As a matter of criminal law, an individual does not enjoy the same freedom over his body when married as he does when single. For example, adultery is a criminal offense which does not exist apart from the institution of marriage. Statutes prohibiting adultery have been enacted to protect marital fidelity, and they are clearly constitutional. *See* concurring opinion of Justice Goldberg, *Griswold v. Connecticut*, 381 U.S. at 498-499. Similarly, statutes such as Sections 563.170 through 563.210, RSMo 1969, mak-

ing bigamy a criminal offense, restrict the freedom of an individual because he or she is married.

The spousal consent requirement in House Bill No. 1211 is consistent with other laws regulating the status and obligations of marriage. Legislatures have determined that it is essential to the integrity of the institution of marriage that important decisions changing the structure or status of the marriage relationship be made by both parties, especially where those changes relate to the bearing and raising of children.

In Missouri, for example, the decision to allow a child to be adopted may be made by the mother alone, if the child is born out of wedlock. However, if the child is born in wedlock, the consent of both parents is required. Section 453.030, RSMo 1969. Thus, when birth occurs, the status of marriage limits what would otherwise be the mother's exclusive right to decide not to raise the child. In the adoption statute, as in the abortion statute, it is the status of being married and not fatherhood alone that gives the father the power to consent. The adoption statute, like the abortion statute, protects the interest of the husband in the family. It does not protect the interest of an unmarried father in his biological offspring. In both adoption and abortion, joint decision-making by husband and wife is treated by the legislature as an element of marriage.

Those states which have enacted laws relating to artificial insemination have conditioned the legitimacy of children so conceived on the consent of both husband and wife to the procedure. Kan.Stat.Ann. Sec. 23-129 (1974); Ga. Code Ann. Sec. 74-101.1(a) (1973); 14 Con. Laws N.Y. Ann., Domestic Relations, Sec. 73 (McKinney Supp. 1975); Va. Code Sec. 64.1-7.1 (1975 Cum. Supp.); Ark.Stat.Ann. Sec. 61-141(c) (1971); Cal. Civ.Code Ann. Sec. 216 (West Supp. 1975); N.C. Gen. Code Sec. 49A-1 (Cum.Supp. 1974). Indeed, Oklahoma expressly forbids the practice of artificial insemination without

the written consent of husband and wife. Oklahoma Stat.Ann., Tit. 10, Section 553 (Supp. 1975).

Two states have enacted laws requiring spousal consent for voluntary sterilization procedures. Georgia, Section 84-932, Ga. Code Ann. (1974 Supp.); Virginia, Section 32-423, Va. Code (1975 Cum. Supp.). Here again, the freedom of a married woman to make her own decisions with respect to child bearing has been limited by statute and conditioned on agreement by the spouse. To insist on joint decision making between husband and wife as a means of preserving and strenghtening the institution of marriage is within the state's power and is not unconstitutional.

The requirement of spousal consent has long been recognized in the law as a limitation on one party's power to dispose of his real property as he pleases. Once married, a man cannot convey good title to the homestead he shares with his wife, unless she consents to the disposition. Section 513.475.2, RS Mo. 1969. The fact that the interests of the husband and wife may conflict or that the husband and wife are separated does not obviate the requirement that both must join in the conveyance of the homestead. *Hoselton v. Hoselton*, 166 Mo. 182, 65 S.W. 1005 (1901); *Hewett v. McGaster*, 133 So.2d 189 (Ala. 1961). Furthermore, as a practical matter, the absence of spousal consent can defeat any real estate conveyance by a married person because the conveyance is presumed in fraud of marital rights. Section 474.150, RSMo. 1969.

Similarly, property held jointly by husband and wife is presumed in Missouri to be held by the entirety. *Leuzinger v. Merrill, Lynch, Pierce, Fenner and Smith*, 396 S.W.2d 570 (Mo.Banc. 1965). This is so even where the property has been obtained solely with the funds of one spouse. *Bender v. Bender*, 220 S.W. 929 (Mo. 1920). A tenancy by the entirety is an estate peculiar to the status of marriage, and any act affecting

title to the property must be achieved jointly by husband and wife. *Hunt v. Blackburn*, 128 U.S. 464 (1888); 4 Thompson on Real Property (1961 replacement) Section 1784. Where changes in property interests are concerned, Missouri insists on joint decision making between husband and wife, which on occasion probably thwarts an individual spouse's desires.

The requirement of spousal consent for the abortion decision is consistent not only with other statutes requiring joint decision making where major changes are made affecting the marriage, but with the best professional thinking on family relations as well. At the trial, William F. Kenkel, Ph.D., Chairman of the Department of Sociology at the University of Kentucky, who has worked extensively in the field of family relations, testified that those things that encourage mutuality, trust, openness and honesty strengthen the institution of marriage. Accordingly, Dr. Kenkel testified that requiring spousal consent to an abortion would strengthen the marital relationship and the institution of marriage. (Kenkel, R. 235-237.)

By enactment of Section 3(3) the state seeks only to safeguard the interdependence and unity of interest essential to the marital relationship by requiring that the decision to terminate a pregnancy, like the decision to conceive, be made jointly or not at all. One party to a marriage can prevent the occurrence of pregnancy by practicing contraception. Recognizing that the consent of both parties is generally necessary to change the *status quo* and to begin a family, the legislature has determined that a change in the family structure set in motion by mutual consent should be terminated only by mutual consent. Contrary to the argument advanced by the plaintiff, the Missouri statute does not seek to give the husband a veto power over the wife's decision to have an abortion. Rather, the legislature has sought to insure that the wife not be able to exercise a veto over a decision which previously was jointly made—the decision to have children.

In attacking the requirement of spousal consent, plaintiffs conjure up a series of hypothetical situations—a "parade of horribles"—which plaintiffs claim illustrate the hardships caused by a spousal consent requirement. Legislation is not unconstitutional merely because, when applied to particular instances, its operation may prove harsh. *Nelson v. City of New York*, 352 U.S. 103 (1956). If this statute is to be struck down it must be because it is unconstitutional—not because, in particular hypothetical situations based on hypothetical facts, the law may prove harsh. *Kahn v. Shevin*, 416 U.S. 351 (1974). Should some of plaintiffs' hypothetical situations occur, a spousal consent requirement may work a hardship because the marriage relationship may be in trouble or in reality non-existent.[7] However, the Missouri legislature did not attempt to do the impossible, i.e., enact a statute which varied its requirements depending on the health of a particular marriage. Missouri's General Assembly did what legislatures have traditionally done; it exercised the policy making

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[7] In situations where the husband is not the father of the fetus, plaintiffs maintain that a husband who withholds his consent to abortion does so with "no legal obligations, duties or rights in regard to the resulting child following birth." (Plaintiffs' Brief at 82.) In such circumstances, plaintiffs contend that a husband "would be free to turn his back and to ignore the child's welfare." (*Id.*) There is no merit to this argument.

A husband may not escape liability for the support of his wife's children merely because he is not their biological father. Where there is evidence that a man has actually or impliedly consented to support an illegitimate child born to his wife, the law will enforce that promise. Thus, support duties have been imposed where the husband knew his wife to be pregnant by another man at the time of their marriage. *State v. Shoemaker*, 62 Iowa 343, 17 N.W. 589 (1883); *Gustin v. Gustin*, 108 Ohio App. 171, 161 N.E.2d 68 (1958); L—— v. L——, 497 S.W.2d 840 (Mo. App. 1973). In like manner, the California Supreme Court unanimously upheld the imposition of criminal responsibility for non support where the defendant husband refused to provide for a child born to his wife after her artificial insemination with the sperm of an anonymous donor. *People v. Sorenson*, 66 Cal.Rptr. 7, 437 P.2d 495 (Cal. Banc 1968). Noting that the child would not have been procreated with-

power inherent in the legislative branch of government for what was believed to be in the best interests of all the people of Missouri. By enacting Section 3(3) the Missouri legislature expressed its belief that open communication and joint decision making between spouses in determining whether to terminate a pregnancy would, *as a general matter*, strengthen a marriage. Section 3(3) focuses not on one spouse or the other but on what was believed by the Missouri legislature to be in the best interests of marriage as an institution.[8]

If a healthy marriage no longer exists or if one or both spouses no longer wish to accept the obligations and responsibilities associated with being married in Missouri, the legislature has provided a means for the rapid dissolution of that relationship.[9] So long as people choose to remain married, they must accept certain obligations and responsibilities be-

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out the defendant's active participation and consent, the court rejected the defendant's attempt to avoid liability on grounds that he was not the biological father of the child:

> "One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such a character as to impose an obligation of supporting those for whose existence he is directly responsible." 66 Cal.Rptr. at 11, 437 P. 2d at 499.

It cannot be maintained that the courts would somehow impose a lesser duty on a husband who, having withheld his consent to abortion, sought to "turn his back" on the child subsequently born to his wife. See *Gursky v. Gursky*, 39 Misc. 2d 1083, 242 N.Y.S. 2d 406 (1963).

[8] See footnote 6 on page 34 quoting the lower court's finding that the decision to abort may have an adverse effect on the future reproductive capacity of the marriage.

[9] It should be noted that Missouri's new "no fault" divorce statute, Chapter 452, RSMo 1969 (1973 Supp.) obviates the most likely circumstances hypothesized in plaintiff's' brief. In many cases, a divorce could be obtained followed by an abortion. For example, in the case of a husband who is absent and his whereabouts are unknown, Sections 452.310.4 and 452.320, RSMo 1973 Supp., when read in conjunction with Rules 54.17 and 55.25 V.A.M.R., provide that a divorce can be obtained in fifty-five days.

lieved by their elected representatives to be in the best interests of society and the institution of marriage.

Section 3(3) constitutes a reasonable exercise of legislative power to preserve and strengthen an institution which ". . . is the foundation of the family and society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. at 211. Unless doubt is to be cast on a state's power and authority to engage in such a noble and traditional endeavor, this Court should affirm the lower court's decision upholding the constitutionality of Section 3(3).

IV

The District Court Properly Declared Constitutional Section 3(4) of House Bill No. 1211,[10] Because Requiring the Consent of a Parent or Person in Loco Parentis Constitutes a Reasonable Means of Furthering the State's Long-Standing Interest in Protecting Minors, Supporting Parents in the Discharge of Their Responsibilities and Promoting the Stability of the Family Unit.

As a general proposition, courts have recognized that minors, under many circumstances, are incapable of rational, informed and mature decisions in crucial matters. *See, e.g., Ginsberg v. New York*, 390 U.S. 629, 643 (n. 10) (1968). In addition, the law may subject minors to more stringent limitations than would be permissible if imposed on adults, even when protected freedoms are involved. *Prince v. Massachusetts*, 321 U.S. 158

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[10] Section 3(4) of House Bill No. 1211 provides as follows: "No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

* * * * * * *

"(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother."

(1944); *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *Duncan v. Louisiana*, 391 U.S. 145 (1968). "Minor," when used without further limitation as to age, is interpreted in Missouri as being any person under the age of twenty-one. 475.010(4), RSMo 1969; *State v. Chapple*, 462 S.W.2d 707, 709-710 (Mo. 1971); *Nelson v. Browning*, 391 S.W.2d 873, 880-881 (Mo. 1965).

Missouri law is replete with provisions reflecting the interest of the state in assuring the welfare of minors. For example, minors must be represented by a guardian *ad litem* or next friend to assert or protect their rights and interests in Missouri courts. Section 507.110, RSMo 1969. Missouri makes special provisions respecting the estates of minors (Chapter 475, RSMo 1969, as amended), the care of delinquent and neglected children (Chapter 211, RSMo 1969, as amended), medical treatment for various disabilities (Chapter 210, RSMo 1969, as amended), child labor (Chapter 294, RSMo 1969, as amended), and compulsory education (Chapters 160 and 167, RSMo 1969, as amended). Implicit in all such legislation is the assumption that minors require the assistance of parents and the state in acquiring the skills and knowledge for making rational and mature judgments in the conduct of their affairs.

Certain decisions are considered by the state to be outside the scope of a minor's ability to act in his own best interest or in the interest of the public. For example, it is unlawful to sell firearms and deadly weapons to minors without parental consent, Section 564.610, RSMo 1969; minors may not be exposed to certain types of literature, Section 563.310, RSMo 1969; pawnbrokers may not purchase property from minors without the consent of the parent, Section 563.780, RSMo 1969; cigarettes (Section 563.880, RSMo 1969) and alcoholic beverages (Section 311.310, RSMo 1969) may not be sold to minors. Parents may sue to recover money lost by a minor's gambling. Section

434.060, RSMo 1969. Parental consent is also required for minors under designated ages to marry (Section 451.090, RSMo 1969). Minors under 18 years of age are not considered competent to enter into contracts. Section 431.060 V.A.M.S. (Sept. 1975 Pamphlet). Furthermore, minors under the age of 18 years may disavow real estate conveyances "within two years after the disability of the minority is removed." Section 442.080, V.A.M.S. (Sept. 1975 Pamphlet). These statutory provisions reflect the judgment of the Missouri General Assembly that, in certain situations, parental guidance must be provided to protect minors where their lack of mature judgment and experience may endanger their well-being or may result in otherwise harmful consequences. Minors do not enjoy the same freedom to make decisions and to act as they please as is enjoyed by adults.

In re Gault, 387 U.S. 1 (1967), does not require that the law must treat minors and adults as identical for all purposes. When a child is before the court, he must be treated fairly, and accorded procedural due process. But this does not mean that a minor possesses the same maturity and judgment as an adult. A legislature may reasonably conclude that, as a general matter, minors do not have the same capacity to make wise decisions as adults, and that where emotionally charged decisions are to be made, parental consent is necessary.

The necessity for adult guidance in making the decision whether to terminate a pregnancy was dramatically demonstrated at trial. First, there is in reality no physician-patient relationship as contemplated by this Court in *Roe v. Wade*, 410 U.S. at 163. Frequently, the abortion decision is not made by a woman in consultation with her responsible physician because many abortions are performed in clinics and teaching hospitals (Davis, R. 140, 135; Widdicombe, R. 148; Kerenyi, R. 81; Anderson, R. 306), where the physician who performs the abortion is not the woman's regular doctor. Whatever counseling is furnished is not provided by the physician who will perform the procedure, and

frequently not by persons with any medical training or experience (Davis, R. 137; Widdicombe, R. 156; Anderson, R. 351).

Children as young as ten years of age have sought abortions (Widdicombe, R. 164), and abortions have been performed on children of the ages of eleven (Widdicombe, R. 164) and thirteen (Warren, R. 74). This Court already has recognized the serious considerations to be weighed in deciding whether to terminate a pregnancy. In addition, the evidence adduced at trial established that a great deal of stress is frequently involved in deciding whether to terminate a pregnancy. The decision to do so may be very tenuous. Warren, R. 30; Anderson, R. 351-352. For the State to permit children to obtain abortions without the counsel of an adult who has responsibility or concern for the child would constitute an irresponsible abdication of the State's duty to protect the welfare of minors.

Plaintiffs allege that Section 3(4) permits parents to prevent their daughter from obtaining an abortion without good reason or for no reason at all. Underlying that contention is an assumption that parents would not have the best interest of their daughters at heart. If it is reasonable to make any assumption, common sense dictates that above all other persons, parents recognize the emotional, psychological, physical and financial burdens associated with bearing and raising children. It would appear likely that their experience with the realities of child-raising would render them sensitive to their daughter's plight and, if anything, dispose them to favor terminating a pregnancy, particularly in the situations described by plaintiffs at page 95 of their brief.

If parents and their daughter have any difference of opinion, it may well be the daughter who favors carrying the pregnancy to term to demonstrate her adulthood, to precipitate a marriage, or to effectuate naive and unrealistic perceptions of motherhood. If such a conflict arises, the child cannot be compelled to

undergo an abortion against her will by virtue of Section 3(2) of House Bill No. 1211, discussed in Point II, ante.[11]

Apart from protecting minors from their own improvidence, the state has a legitimate interest in requiring that a parent or person *in loco parentis* consent to the abortion of a minor. The primary responsibility for the custody, care and nurture of the child resides in her parents. In discharging their responsibilities, parents are entitled to the support and assistance of the state. *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944). Indeed, parental discretion has been protected from unwarranted or unreasonable interference by the state. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Section 3(4) of House Bill No. 1211 is reasonably related to the purpose of supporting the family in the discharge of its responsibilities. The testimony adduced at trial established that it is essential for the family in our society to provide for minors' economic support, to proetct them from the physical environment and psychological harm, and to offer guidance, counseling and security. Anything that interferes with these functions is deleterious to the family as a social unit and hampers the development of responsible, healthy adults (Kenkel, R. 238). Thus, it was the opinion of Dr. William F. Kenkel, Chairman of the Department of Sociology at the University of Kentucky, that im-

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[11] On two occasions county officials have telephoned the Office of the Attorney General for clarification of consent requirements pertaining to abortion. In both instances, the parents of an unmarried pregnant minor (ages 13 and 15 respectively) wanted their daughter to terminate her pregnancy, but the daughter was unwilling to do so. In both cases, the question raised by the county official was whether the child could be compelled, against her will, to have an abortion. These situations demonstrate that parents frequently recognize that terminating a pregnancy is preferable to carrying the pregnancy to term. These situations also support the need for a statutory requirement that the patient consent in writing to the performance of an abortion. See Point II, ante.

plementation of Section 3(4) would tend to strengthen the family and society by enabling parents to carry out their responsibilities to their children (Kenkel, R. 239-240). That was one objective of the Missouri General Assembly in enacting Section 3(4). (O'Toole, R. 200.)

The legislative history of House Bill No. 1211 supports the conclusion that Section 3(4) was enacted only to assure that the pregnant minor receive the guidance of an adult with a particular concern for her welfare. The original version of the bill required the consent of both parents. The General Assembly concluded, however, that the consent of only one parent or person *in loco parentis* would accomplish the objective of assuring sensitive guidance. (O'Toole, R. 200.)

Implementation of Section 3(4) of House Bill No. 1211 imposes no additional burden on physicians in the practice of their profession, because even prior to the effective date of House Bill No. 1211, physicians required parental consent before performing an abortion on a minor (Widdicombe, R. 149, 164; Warren, R. 24, 72). Although the reason physicians require parental consent is to insulate themselves from civil and criminal liability,[12] the rationale underlying that liability is that parents are the appropriate persons to determine what medical care is in the best interest of their children.

Plaintiffs contend that it is preferable for the physician to evaluate the maturity and judgment of his patient, and if it appears that she is capable of giving an informed consent, then he should be free to perform the abortion without the consent of a parent. Defendant submits that the patient's parents are in a far superior position to evaluate the maturity of their daughter. Indisputably, they are in a better position to evaluate her ma-

[12] 61 Am.Jur.2d, Physicians and Surgeons, Sections 155-161, 283-290; Annotation, 76 A.L.R. 564-565 (1932); Annotation, 139 A.L.R. 1370, 1371-1374 (1942).

turity than are lay counselors who staff abortion clinics (Davis, R. 137; Widdicombe, R. 156), or the physician who will meet the child for the first time when she arrives at the clinic for an abortion, and who will spend a total of twenty-six minutes with her (Widdicombe, R. 159-160; Anderson, R. 350). See also, Point II, ante.

In addition, defendant submits that while twenty-one years of age constitutes majority for most purposes in Missouri, Section 3(4) of House Bill No. 1211 applies only to minors under the age of eighteen. This departure from the general rule reflects the intent of the legislature to protect only those who most need adult guidance.

By virtue of the foregoing, defendant submits that requiring the consent of a parent or person *in loco parentis* to a minor's abortion constitutes a reasonable means of furthering the long-standing interests of the State of Missouri in protecting minors from the consequences of a hasty decision on a critical matter and in supporting parents in the discharge of their familial responsibilities. Accordingly, the judgment of the district court declaring Section 3(4) constitutional must be affirmed.

V

The District Court Erred in Holding Unconstitutional Section 6(1) of House Bill No. 1211,[13] Because:

A. **The first sentence of Section 6(1) does not require physicians to employ abortion techniques designed to assure live delivery of the fetus.**

The district court erroneously found as follows:

> "The first sentence of Section 6(1) prescribes the standard of care which a person performing an abortion must exercise for the protection of the fetus, without reference to any particular stage of pregnancy." *Planned Parenthood v. Danforth*, 392 F.Supp. at 1371.

Accordingly, the court held "that the first sentence of Section 6(1) is unconstitutionally overbroad for failure to exclude the stage of pregnancy prior to viability." *Id.* at 1371.

Defendant submits that Section 6(1) of House Bill No. 1211, including the first sentence thereof, establishes a standard of care that applies only after an abortion has been performed. The intent of the General Assembly is to protect the life of the fetus who survives the procedure by imposing upon physicians the affirmative duty to take reasonable and appropriate measures to

[13] Section 6(1) of House Bill No. 1211 provides as follows: "No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo."

sustain its life. The district court's findings and conclusions to the contrary are not supported by the language of the statute, its legislative history or the evidentiary record below; accordingly, the judgment of the lower court is clearly erroneous and must be reversed.

The first sentence of Section 6(1) provides as follows:

> "No *person* who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such *person* would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted." (Emphasis supplied.)

This sentence applies to the persons who perform abortions; it does not apply to fetuses. It describes a standard of care; it does not purport to describe the circumstances to which that standard of care applies.

The second sentence of Section 6(1) provides as follows:

> "Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the *life of the child*, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo."

This sentence describes the circumstances when the standard of care applies, namely when a live child results from the abortion procedure. When that occurs, the person performing the abortion must take measures to sustain and encourage the life of the child. "Such measures" are defined by reference to the standard of care described in the first sentence, which equates what the physician must do in an abortion situation with what he would do if a live birth were intended. The failure to take such measures, resulting in the death of the child, subjects the

person who performed the abortion to prosecution for manslaughter and suit for civil damages. Thus, the sanctions provided in Section 6(1) apply only when the following events occur: 1) an abortion is performed; 2) the fetus survives; 3) the physician fails to exercise his professional skill, care and diligence to encourage or sustain the life of the child; and 4) as a result, the child dies.

Application of Section 6(1), as so interpreted, does not infringe upon the right of women to terminate their pregnancies, and it does not interfere with the medical judgment of physicians in effectuating the woman's decision. The pregnancy has been terminated before Section 6(1) becomes operative. Section 6(1) focuses on the child who survives the procedure. Certainly, if the state has a compelling interest in protecting potential human life, *Roe v. Wade*, 410 U.S. at 162, 163, Missouri's right to protect actual human life cannot be contested.

Documentary material and testimony before the Missouri General Assembly support the conclusion that the life of a fetus who survives an abortion can be protected only by imposing upon physicians an affirmative duty (O'Toole, R. 180-181). The General Assembly has not specified what physicians must do to preserve the life of a fetus who survives an abortion. Instead, the imposed standard of care is equated with that which would obtain if a live birth were intended. Medical testimony at trial described what measures could be taken to encourage the life of the fetus. Warren, R. 67-68; Kerenyi, R. 103-105; Klaus, R. 278.

Plaintiffs interpret Section 6(1) as an imposition upon physicians of a standard of care to protect the fetus *during* the abortion. In other words, plaintiffs suggest that Section 6(1) requires that physicians employ an abortion technique or procedure designed to insure live delivery of the fetus. Because performing an abortion involves taking action which is deleterious to the fetus (Warren, R. 29; Kerenyi, R. 91), plaintiffs contend that Section 6(1) effectively precludes abortion.

If the General Assembly had intended to accomplish the objective plaintiffs describe, they would have specifically so provided, as did the Pennsylvania legislature, whose abortion statute was reviewed in *Planned Parenthood Association v. Fitzpatrick*, 401 F.Supp. 554 (E.D.Pa. 1975). Section 6605(a) of the Pennsylvania statute (35 Pa. Stat., Sec. 6601, et seq.) reads as follows:

> "Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the *abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.*" (Emphasis supplied).

It is noteworthy that although this provision incorporates a standard of care identical to the first sentence of Section 6(1), the Pennsylvania provision specifically requires physicians to employ an abortion technique designed to assure live delivery of the fetus. Section 6(1) does not require that any particular abortion procedure be used. It is also noteworthy that plaintiffs misrepresent the holding of the court in *Fitzpatrick* by quoting only the standard of care portion of the statute and asserting that the district court declared unconstitutional a provision identical to Section 6(1). (Plaintiffs' Brief at 107).

Similarly, plaintiffs misrepresent the holding of the district court in *Hodgson v. Anderson*, 378 F.Supp. 1008 (D.Minn. 1974), *app. dismissed*, 420 U.S. 903 (1975). In that case the court held that ascribing human status and providing protection to a live-born fetus does not offend the standards of *Roe* and *Doe*, *supra*. 378 F.Supp. at 1017. The Minnesota provision was stricken because the definition of "viable" and "potentially viable" upon which it depended were constitutionally defective. 378 F.Supp. at 1017. For the same reason, the court in *Doe v. Rampton*, 366 F.Supp. 189 (D. Utah 1973), voided similar provisions in the Utah statute. 366 F.Supp. at 193, 196.

If Section 6(1) of House Bill No. 1211 required physicians to employ an abortion technique designed to assure live delivery of the fetus, plaintiffs' interpretation of the provision might be tenable. However, only defendant's interpretation of Section 6(1) is supported by the language of Section 6(1), by the legislative history of House Bill No. 1211 and by the testimony of its principal sponsor (O'Toole, R. 180-181; 211-214). It cannot be presumed that the General Assembly intended to sabotage the provisions of House Bill No. 1211 which clearly authorize abortions, by the sophisticated guise of Section 6(1) as interpreted by plaintiffs. See Section 1, House Bill No. 1211. Nor can Section 6(1) be interpreted to require physicians to employ abortion techniques designed to assure live delivery of fetuses, for it does not so provide.

In essence, plaintiffs ask this Court to construe Section 6(1) of House Bill No. 1211. If their interpretation of the provision were correct, the first sentence of Section 6(1) would be unconstitutional. If defendant's interpretation is correct, Section 6(1) constitutes a permissible exercise of the authority of the state of Missouri to protect human life. Faced with two diametrically opposed interpretations, one of which is constitutional, this Court should abstain from construing Section 6(1) and refer plaintiffs to their state courts for resolution of this

issue. *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Zwickler v. Koota*, 389 U.S. 241 (1967); *Harman v. Forssenius*, 380 U.S. 528 (1965); *Harrison v. NAACP*, 360 U.S. 167 (1959).

In any event, defendant submits that Section 6(1) manifests the clear intent of the legislature to protect only that human life surviving an abortion. The provision is therefore consistent with the compelling interest identified by this Court in *Roe v. Wade*, 410 U.S. at 160-163. When Section 6(1) is properly interpreted in accordance with the legislative intent, it does not contravene the parameters defined by this Court, for the constitutional right first described in *Roe v. Wade* is the right of women to choose not to bear unwanted pregnancies. Neither women nor their physicians have the right to be heedless of actual human life that survives the abortion procedure.

B. Assuming arguendo that this court concludes that the first sentence of Section 6(1) requires physicians to employ abortion techniques designed to assure live delivery of a fetus, that sentence is severable from the remainder of the section.

The district court concluded that only the first sentence of Section 6(1) was invalid:

> "The Court, therefore, holds that the *first sentence* of Section 6(1) is unconstitutionally overbroad for failure to exclude the stage of pregnancy prior to viability." (Emphasis supplied.) 392 F.Supp. at 1371.

However, the court directed and the clerk prepared judgment declaring ". . . that Section 6(1) of House Bill 1211 is unconstitutional and defendants are enjoined from enforcing Section 6(1) of House Bill 1211." 392 F. Supp. at 1374; paragraph 2, Order, Judgment and Decree, printed in the Appendix to the Jurisdictional Statement in Cause Number 74-1419, at 46. Defendant moved the district court to alter or amend its judgment

to bring it into conformity with the opinion. Appendix to the Jurisdictional Statement in Cause Number 74-1419, at 47-49. Defendant's Motion was overruled.

Section B of House Bill No. 1211 manifests the intent of the legislature that the provisions of the statute be severable. The first sentence of Section 6(1) defines a standard of care. The second sentence describes when and to whom that standard of care applies, but it also provides that the failure of persons performing abortions to take steps to encourage or to sustain the life of the child constitutes manslaughter. Even if the first sentence of Section 6(1) were declared unconstitutional, it cannot be doubted that the Missouri General Assembly intended to declare as manslaughter the failure to attempt to preserve the life of a child surviving an abortion. The first sentence of Section 6(1) is severable, and accordingly, the district court erred in declaring Section 6(1) unconstitutional in its entirety.

VI

The District Court Properly Declared Constitutional Section 7 of House Bill No. 1211,[14] Because Terminating Parental Rights Constitutes a Reasonable Means of Furthering the Compelling Interest of the State of Missouri in Protecting Actual Life.

The objective of Section 7 of House Bill No. 1211 is for the state to assume immediate custody and responsibility of the child

[14] Section 7 of House Bill No. 1211 provides as follows: "In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411, RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant."

who survives an elective abortion. The provision is predicated upon a fact that has an obvious and direct relationship to the future welfare of the child, namely, that the parents consented to the attempted destruction of the unborn fetus. The purpose of an abortion is to kill the fetus (Anderson, R. 352; Warren, R. 29). A woman desiring an abortion does not want a live-born child (Anderson, R. 352, 357). Inherent in the decision to abort, therefore, is a threat to the future well-being of the child, which the legislature reasonably believed required the termination of parental rights.

Section 7 of House Bill No. 1211 applies only after the following events occur: 1) a woman consents to and obtains an abortion which is not necessary to preserve her life or health and 2) the fetus survives. This court held in *Roe v. Wade* that the state has an important and legitimate interest in the protection of potential human life. 410 U.S. at 162, 163. Certainly if the state can protect potential human life by prohibiting abortions from and after viability, the state can protect the life of a fetus who survives an abortion procedure.

Underlying Section 7 is the responsibility of the state for the protection of an unwanted child whom the mother knowingly tried to destroy. The General Assembly reasonably presumes that the child would be unsafe in his mother's custody and that the state must intervene. *Stanley v. Illinois*, 405 U.S. 645 (1972), is not dispositive, for in that case, "unfitness" was arbitrarily and irrationally presumed from the mere fact that the father was not married. Contrary to the situation in *Stanley*, the voluntary consent by a parent to a procedure intended to result in the death of the child bears a direct and reasonable relationship to the conclusion that parental rights should be terminated.

In the event that parents who consent to an elective abortion decide they want custody of the child, they may petition the

court. Section 7 provides that consenting parents of a child aborted alive shall have no parental rights or obligations as if their "rights had been terminated pursuant to Section 211.411 (sic) of the Missouri Revised Statutes." The correct provision, Section 211.441, RSMo 1969, adopted by reference in Section 7 of House Bill No. 1211, enumerates the circumstances under which parental rights may be terminated, which include abandonment of the child. When parental rights are terminated as provided in Section 211.441, RSMo 1969, the order of termination is not final for one year thereafter. See Section 211.511, RSMo 1969. Accordingly, the parents may petition the court to grant them custody on the ground that they are fit parents for the child, notwithstanding their prior consent to the abortion. The presumption of unfitness, therefore, is rebuttable.

Finally, defendant submits that no evidence was presented below indicating that the series of events to which Section 7 applies has ever occurred. Thus, the issue is an abstraction and not justiciable. *Golden v. Zwickler*, 394 U.S. 103 (1969). Further no plaintiff before this Court has standing to challenge Section 7, for this provision does not operate directly against any interest of plaintiffs. *Poe v. Ullman*, 367 U.S. 697 (1961); *Flast v. Cohen*, 392 U.S. 83 (1968).

By virtue of the foregoing, defendant submits that if this Court reaches the merits of the constitutionality of Section 7, the provision constitutes a reasonable measure designed to protect actual human life surviving the abortion procedure. Accordingly, the judgment of the district court declaring Section 7 constitutional must be affirmed.

VII

The District Court Properly Declared Constitutional Section 9 of House Bill No. 1211,[15] Because:

A. **The Missouri General Assembly reasonably determined that saline amniocentesis is deleterious to maternal health.**

Disposition of plaintiffs' challenge to Section 9 will have serious ramifications in two significant areas: 1) the authority of government, federal or state, to regulate methods of practicing medicine for the protection of public health; and 2) the extent to which courts will substitute their judgment for that of legislative bodies, federal and state, in determining the wisdom of specific regulations. It is defendant's position that: (1) the prohibition of saline amniocentesis constitutes a reasonable means of furthering the compelling interest of the state of Missouri in protecting maternal health; and (2) the finding of the Missouri General Assembly that saline amniocentesis is deleterious to maternal health is supported by overwhelming medical evidence to which this Court should defer.

In *Roe v. Wade*, this Court held that the state has a compelling interest in protecting maternal health and that it may adopt reasonable regulations in furtherance of that interest applicable after the end of the first trimester of pregnancy. 410 U.S. at 164.

Because this Court has recognized the authority of the state to regulate abortion to protect maternal health, only two ques-

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[15] Section 9 of House Bill No. 1211 provides as follows: "The general assembly finds that the method or technique of abortion known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy."

tions remain: (1) whether the Missouri General Assembly reasonably concluded that saline amniocentesis is deleterious to maternal health; and (2) whether the prohibition of saline amniocentesis effectively precludes mid-trimester abortion. On the basis of the following, defendant submits that Section 9 of House Bill No. 1211 constitutes a proper exercise of the State's authority to regulate abortions in the interest of maternal health.

Relying on substantial medical data and testimony, the Missouri General Assembly determined that the procedure known as "saline amniocentesis" is deleterious to maternal health. The Missouri legislature prohibited its use after the first twelve weeks of pregnancy[16] on the basis of other medical data describing the availability and advantages of alternative abortion procedures. O'Toole, R. 185-192, 207, 209; Def. Ex. J, R. 191-192, 192-194, 374-376; Def. Ex. K, R. 192, 192-194, 374-376; Def. Ex. M, R. 188-189, 192-194, 374-376; Def. Ex. R, R. 374-376; Def. Ex. W, R. 185-186, 192-194, 375-376; Def. Ex. X, R. 186-187, 192-194, 375-376; Def. Ex. Y, R. 187, 192-194, 375-376; Def. Ex. Z, R. 187-188, 192-194, 375-376; Def. Ex. BB, R. 189-190, 192-194, 375-376; Def. Ex. LL, R. 375-376; and Def. Ex. DD, R. 191, 192-194, 375-376.

The State of Missouri has the authority and the obligation to enact laws to protect the health and welfare of its citizens. In the context of abortion procedures, it may adopt reasonable regulations to protect maternal health, applicable after the first trimester of pregnancy. This Court should defer to the findings of the Missouri General Assembly, for in the words of Chief Justice Hughes, speaking for a unanimous Court:

[16] The procedure known as saline amniocentesis is not medically practicable prior to the fourteenth to sixteenth week of gestation (Warren, R. 61).

> "When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside merely because compliance is burdensome." *Sproles v. Binford*, 286 U.S. 374, 388-389 (1932).

See also, *Paris Adult Theatre, I v. Slaton*, 413 U.S. 49 (1973); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

The overwhelming medical evidence introduced in the court below supports the finding of the Missouri General Assembly that saline amniocentesis is deleterious to maternal health and should be prohibited.

The procedure identified by the legislature as "saline amniocentesis" involves the insertion into the amniotic cavity of a needle or catheter, the removal of a substantial amount (100 to 200 ccs.) of amniotic fluid, and the injection of a like volume of saline (Kerenyi, R. 115-116; Warren, R. 61-63; Klaus, R. 259; Anderson, R. 309). The effect of hypertonic saline is to withdraw fluid from the cells, disrupt the metabolism, and denature the proteins in the fetus, the decidua and the placenta (Warren, R. 64; Klaus, R. 260). As a result, the fetus dies (Warren, R. 64-65). Labor begins in approximately twelve hours (Anderson, R. 310), and the fetus is expelled from the uterus twenty to thirty-six hours after the injection (Klaus, R. 274). In order to shorten the injection-delivery interval, physicians frequently (in 50 percent of the cases, Warren, R. 79) use oxytocin in conjunction with saline, which activates the uterine muscles (Warren, R. 76; Klaus, R. 270; Anderson, R. 310).

Severe complications are implicit in the use of saline amniocentesis, regardless of the skill of the physician or the precautions

taken (Hall, Deposition, part of which was read into evidence, R. 369; Def. Ex. E, R. 374-376; Def. Ex. G, R. 374-376; Def. Ex. I, R. 374-376; Def. Ex. K, R. 374-376; Def. Ex. P, R. 374-376; and Def. Ex. R, R. 374-376). One of the most serious of these is disseminated intravascular coagulation or consumptive coagulopathy (Warren, T. 57-58; Kerenyi, R. 100; Klaus, R. 269-270; Anderson, R. 307; Def. Ex. H, R. 374-376 and Def. Ex. M, R. 188-189, 192-194, 374-376). In virtually one hundred percent of the cases, some effect on the clotting mechanism of blood occurs (Klaus, R. 269-270; Warren, R. 57; Anderson, R. 307; Def. Ex. H, R. 375-376). In aggravated cases, severe bleeding may occur and result in death (Warren, R. 58), or require, as in three of Dr. Kerenyi's cases, a hysterectomy to prevent death (Klaus, R. 270).

Hypernatremia constitutes another major complication peculiar to the use of hypertonic saline, even when the solution is properly administered (Klaus, R. 268). The patient's body struggles to correct the marked rise in blood sodium, which leads to both tissue dehydration and water intoxication. If these phenomena go uncorrected, the patient can quickly progress from coma to convulsions to death (Klaus, R. 268). Finally, saline, however skilifully administered, results in massive tissue destruction inside the uterine cavity (Anderson, R. 308).

Oxytocin is used in conjunction with saline in 50 percent of the cases (Warren, R. 79), and precipitates additional complications, namely, water intoxication (Anderson, R. 310; Def. Ex. L, R. 374-376) and cervical rupture (Klaus, R. 271). Water intoxication can result in damage to the central nervous system, rendering the patient a "vegetable" (Warren, R. 76-77; Klaus, R. 270-271). Cervical tearing can result from the tumultuous labor produced by the oxytocin (Klaus, R. 271). In addition, oxytocin intensifies the chance of clotting defects implicit in the use of hypertonic saline (Anderson, R. 310).

In addition to these dangers inherent in the use of hypertonic saline, there are extreme risks if the solution is improperly administered (Def. Ex. K, R. 192, 192-194, 374-376). If it is injected into the vein, or if too much saline is injected in the wrong location too rapidly, the consequences are often fatal (Warren, R. 54-56; Kerenyi, R. 113-114; Klaus, R. 273; Anderson, R. 308). But when saline is administered as slowly as it should be, the injection requires at least thirty minutes, during which time the patient may move and dislodge the needle (Anderson, R. 309). Short of death, malinjection of saline can cause so much tissue destruction in the uterus that a hysterectomy is necessary, or the patient may otherwise become infertile (Anderson, R. 308).

Although plaintiffs argue that the risks of morbidity and mortality are insignificant in comparison to the total number of saline abortions performed, the figures currently available do not accurately reflect the incidence of complications, for little followup is conducted on patients who receive abortions (Kerenyi, R. 122). Furthermore, many physicians have no experience with the procedures involved in saline amniocentesis, and, as the demand for abortions increases with legalization, these unskilled doctors will be called upon to induce mid-trimester abortions. As a consequence, the incidence of malinjection of saline and the concomitant hazards will be multiplied (Anderson, R. 309).

In the form of both articles and testimony, medical evidence describing the risks and consequences of saline amniocentesis were available to and considered by the Missouri General Assembly, as well as evidence describing the advantages of other procedures (O'Toole, R. 185-192; Def. Ex. J, R. 191-192, 192-194, 374-376; Def. Ex. K, R. 192, 192-194, 374-376; Def. Ex. M, R. 188-189, 192-194, 374-376; Def. Ex. R, R. 374-376; Def. Ex. W, R. 185-186, 192-194, 375-376; Def. Ex. X, R. 186-187, 192-194, 375-376; Def. Ex. Y, R. 187, 192-194, 375-376; Def. Ex. Z, R. 187-188, 192-194, 375-376; Def. Ex.

BB, R. 189-190, 192-194, 375-376; Def. Ex. CC, R. 190, 192-194, 375-376; and Def. Ex. DD, R. 191, 192-194, 375-376). Defendant submits, therefore, that the legislature reasonably concluded that saline amniocentesis is deleterious to maternal health on the basis of overwhelming medical evidence.

B. **Prohibiting saline amniocentesis constitutes a reasonable means of furthering the State of Missouri's compelling interest in protecting maternal health.**

Where two alternative methods of mid-trimester abortion are available, one of which is medically safer than the other, the legislature may reasonably prohibit the more dangerous procedure. The safest mid-trimester abortion procedure is the intra-amniotic injection of prostaglandin. Mid-trimester abortions also may be induced by surgery (hysterotomy and hysterectomy), the injection of various drugs, dyes or substances (intra-amniotically or extra-ovularly), and mechanical stimulation (metreurynter bag, bougies, Foley catheter, etc.) (Warren, R. 41, Kerenyi, R. 87; Klaus, R. 264-268; Anderson, R. 306-307; Def. Ex. P, R. 374-376; Def. Ex. Q, R. 374-376).[17]

The prostaglandin procedure entails inserting a needle into the amniotic sac, aspirating (*but not removing*, Anderson, R. 310) one cc. of fluid to insure the proper location, and injecting approximately 8 ccs. of prostaglandin (Warren, R. 62-63; Klaus, R. 258-259; Anderson, R. 309-310). No fluid is withdrawn, and because only a small quantity is injected, the procedure takes only a few minutes. Prostaglandin works by inducing con-

[17] Plaintiffs argue that the Missouri legislature has failed to prohibit hysterectomy and hysterotomy, which are less safe than saline (Plaintiffs' Brief at 125). In those situations where hysterectomy or hysterotomy are indicated, there is no safer procedure to use as an alternative (Anderson, R. 331, Klaus, R. 272). By way of contrast, prostaglandin is an alternative to saline amniocentesis, and because prostaglandin is safer, saline is prohibited.

tractions (Warren, R. 65; Anderson, R. 307); the mean injection-delivery interval is approximately fifteen hours (Klaus, R. 274).

The only adverse effects from prostaglandin abortions are nausea, vomiting and diarrhea (Warren, R. 47; Kerenyi, R. 97), which can be easily treated (Kerenyi, R. 99; Def. Ex. FF, R. 374-376). Use of prostaglandin cannot result in disseminated intravascular coagulopathy (Warren, R. 75; Anderson, R. 308), hypernatremia (Warren, R. 57; Anderson, R. 309), or water intoxication (Anderson, 308, 310-311). Of equal significance, the only consequences of malinjection of prostaglandin are a transient fall in the blood pressure, nausea, vomiting and diarrhea (Klaus, R. 274; Anderson, R. 309). There have been no reported deaths caused by prostaglandin (Klaus, R. 280; Anderson, R. 323).

Prostaglandins are superior to saline for yet another reason: they are more effective for inducing abortions (no failures, Anderson, R. 312). Furthermore, they are easier and faster to administer and the fetus is aborted sooner (Anderson, R. 310; Def. Ex. J, R. 374-376). There are fewer, if any, contraindications for their use. Saline amniocentesis is contraindicated for patients with renal, hypertensive or cardiac diseases (Warren, R. 51; Kerenyi, R. 102; Klaus, R. 267). By way of contrast, the only contraindications suggested by the manufacturer of prostaglandin are asthma and glaucoma (Anderson, R. 312).[18]

[18] Glaucoma is rare in women of child-bearing age (Anderson, R. 313). Preexisting asthma has been found to occur in only four-tenths of one percent of the women seeking abortion (Klaus, R. 266; Def. Ex. EE, R. 374-376). Dr. Anderson has discovered no adverse effects from using prostaglandins on patients with asthma (R. 313). Whatever effect prostaglandin has on women with glaucoma or asthma would be the same for a saline induced abortion because the production of prostaglandins occurs naturally in labor (Anderson, R. 339, 363-367). Furthermore, other mid-trimester abortion procedures, such as the metreurynter bag, could be used for patients with those symptoms.

With one exception, all medical witnesses who testified at trial agreed that prostaglandin was safer than saline amniocentesis (Warren, R. 56; Klaus, R. 274-276; Anderson, R. 308-309, 312, 328-329), including plaintiffs Freiman and Hall. The following portion of the deposition of plaintiff Freiman was read into evidence:

> "Q. Do you have any information on the risks to the health of the mother from prostaglandin?
>
> "A. The risk from prostaglandin is thought to be even less than the risk of saline amniocentesis." (R. 368).

The following portion of the deposition of plaintiff Hall was read into evidence:

> "Q. Do the problems or complications feasible (sic) with the saline procedure include others you haven't named yet?
>
> "A. Of the saline?
>
> "Q. Of the saline amniocentesis?
>
> "A. Mainly the number one complication would be a technical one if the saline were injected in the wrong place. The second is the rare complication of disseminated intervascular (sic) coagulation.
>
> "Q. And that would be regardless of the physician's skill, something that inheres in the procedure itself?
>
> "A. That is correct. That is why the prostaglandins have been developed and that is why we are developing others.
>
> "Q. To avoid that kind of complications?
>
> "A. Yes." (R. 369-370).

Only Dr. Kerenyi would not say that prostaglandin is safer than saline amniocentesis (R. 93-94), and his confidence in the

safety of saline was qualified by the necessity of strict adherence to the protocol he developed for its administration (R. 102).[19]

Based upon his extensive research with and experience in using prostaglandin to induce abortions, Dr. Gerald Anderson, Chief of Obstetrics at the Yale University School of Medicine, emphatically criticized those physicians who use saline instead of prostaglandins or who fail to inform themselves of the advantage of prostaglandins. The following questions were asked by plaintiffs' counsel and answered by Dr. Anderson:

> "Q. For a physician who chooses to perform second and later trimester abortion procedures by the saline method, in your opinion is that still a sound medical practice?"
>
> "A. If after presented with all the facts, if the physician chooses to use saline and has a bad outcome, then I think the patient would have good grounds for suit."
>
> "Q. That's not entirely responsive to the question."
>
> "A. All right. In my opinion, a physician, given all the facts on both methods, I would feel that he would be practicing bad medicine if he chose saline over prostaglandins, yes." (R. 336).

* * * * * * *

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[19] It should be noted that Dr. Kerenyi's testimony was contradicted in several material respects. Dr. Kerenyi testified that the contraindications of saline ("hypertensive, vascular sufferers, those with severe uncorrected anemia," etc., R. 103), apply equally to prostaglandin (R. 102); Dr. Kerenyi stated that he derived this information from the circular published by Upjohn, the exclusive manufacturer of prostaglandin. Yet, Dr. Gerald Anderson, the physician described by Dr. Kerenyi as the primary medical investigator of prostaglandin (R. 121), testified that the same circular lists only asthma and glaucoma as contraindications for prostaglandin (R. 312). Dr. Kerenyi also suggested that hemorrhage and bleeding defects (R. 100) are becoming as prevalent from the use of prostaglandin as from saline amniocentesis; this, too, is contradicted by Dr. Anderson (R. 307-308). Finally, Dr. Kerenyi testified that only 776 abortions had been induced by intra-amniotic instillation of prostaglandin (R. 232); in fact, some 5,000 abortions have been performed with prostaglandin (Anderson, R. 323).

"Q. Is it a fair statement, then, to say that in your opinion approximately, based on your prior testimony, that 65 per cent of physicians in this country doing second or later trimester abortions are not using sound medical judgment?"

"A. No, I think that 65—all 65 per cent of these physicians have not read the medical literature enough to inform themselves about the advantages of prostaglandins."

"Q. Is that in and of itself not some reflection upon their medical practice, without being familiar with the literature?"

"A. Yes, it is." (R. 337-338).

Because of the dangers that attend saline amniocentesis, neither Dr. Anderson nor Yale-New Haven Hospital will perform saline abortions; both use prostaglandin instead (R. 307-308, 359).

Plaintiffs argue that the words "other fluid" contained in Section 9 of House Bill No. 2111 expand the coverage of Section 9 to include any midtrimester abortion procedure during which *any* fluid is inserted into the amniotic sac, including the intra-amniotic injection of prostaglandin. The clear intent of Section 9 is to prohibit only one procedure: the "method or technique of abortion known as saline amniocentesis." Other methods of midtrimester abortions, such as injection of prostaglandin, are not known as "saline amniocentesis."

The clause ". . . whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor," merely describes saline amniocentesis and it describes *only* saline amniocentesis. Only saline amniocentesis involves the withdrawal of amniotic fluid and the injection of saline (Kerenyi, R. 115-116; Warren, R. 61-63; Klaus, R. 259; Anderson, R. 309). Only saline operates to kill the fetus (Warren, R. 64-65).

Administering prostaglandin does not entail the withdrawal of amniotic fluid or the injection of saline, and prostaglandins are not injected for the purpose of killing the fetus (Warren, R. 62-65; Klaus, R. 258-259; Anderson, R. 307-310). The reference in Section 9 to "other fluid" was strictly an attempt by the legislature to include saline by whatever name identified, *e.g.*, salt, hypertonic saline, or sodium chloride. Although criminal statutes must be strictly construed, that principle of statutory construction does not override common sense and evident statutory purpose. The standard is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers. *United States v. Moore*, No. 74-759, 44 U.S.L.W. 4023, 4030 (December 9, 1975); *United States v. Brown*, 333 U.S. 18, 25-26 (1948).

Plaintiffs contend that the availability of prostaglandin is limited, and that the effect of prohibiting saline amniocentesis is "to foreclose effectively all post first-trimester abortions." (Plaintiffs' Brief at 116, 120 and 123). That contention of plaintiffs is not true. It is contradicted by the findings of the district court, and it is contradicted by the evidence presented at trial. The district court expressly based its decision with respect to the constitutionality of Section 9 on the availability of safe alternatives to the saline method. The court said:

"[t]he validity of the Missouri legislature's refusal to permit use of the saline method after the twelfth week of pregnancy must turn on the availability of safe alternative methods of inducing abortions."

* * * * * * * *

"The most significant of these methods is the intraamniotic injection of prostaglandin."

* * * * * * * *

"Nor is prostaglandin the exclusive alternative to saline amniocentesis. The mechanical means of inducing abortion

are also less dangerous. . . ." *Planned Parenthood v. Danforth*, 392 F.Supp. at 1373.

The finding of the district court that prostaglandin is an available alternative to saline is supported by the record. After a period of experimental use, prostaglandin was approved by the Food and Drug Administration for sale in January, 1974. During the first six months of 1974, the Upjohn Company restricted sales to around twenty medical centers from coast to coast so that information on its use would "diffuse gradually to all hospitals." (Anderson, R. 334, 335.) As of July 18, 1974, the date on which Dr. Anderson's deposition was taken, prostaglandin was being used not only in large teaching centers, but also in "small hospitals all over the country." (Anderson, R. 342.)

Plaintiffs argue next that prohibiting saline amniocentesis infringes upon their rights as physicians to practice their profession free from governmental interference. Defendant submits that there is no recognized constitutional right to practice medicine; indeed, this Court has so held. See *Dent v. West Virginia*, 129 U.S. 114 (1889), and cases cited therein. Nor do *Roe v. Wade* and *Doe v. Bolton* support plaintiffs' asserted right to practice medicine, for the right of physicians discussed therein is merely derivative of the woman's right to terminate her pregnancy and to effectuate that decision. The right of physicians was qualified as follows:

> "The decision vindicates the right of the physician to administer medical treatment according to his professional judgment *up to the points where important state interests provide compelling justifications for intervention.*" (Emphasis supplied). *Roe v. Wade*, 410 U.S. at 165-166.

After the end of the first trimester, the interest of the state in protecting maternal health becomes compelling and justifies state regulation.

Basically, plaintiffs contend that once a physician is licensed by the state, he is entitled to practice his profession and exercise his medical judgment free from governmental regulation. Any abuse may be remedied adequately and exclusively by "judicial and intra-professional" procedures, "professional censure and deprivation of his license." (Plaintiffs' Brief at 126-127.) This Court's recent decision in *United States v. Moore*, No. 74-759, 44 U.S.L.W. 4023 (December 9, 1975), refutes plaintiffs' assertion that physicians, once licensed, are free to practice medicine as they see fit subject only to traditional judicial and professional remedies. The federal regulations questioned in that case specifically authorize the Secretary of Health, Education and Welfare, after consultation with the Attorney General, to ". . . determine the appropriate methods of professional practice in the medical treatment of narcotic addiction. . . ." 42 U.S.C. Section 257a (1970). This Court found the provisions of 21 U.S.C. Section 801, et seq., to manifest Congressional intent to "confine authorized medical practice within acceptable limits," 44 U.S.L.W. at 4029, and this Court concluded that physicians who go beyond "approved practice," as so determined, are subject to serious criminal penalties. 44 U.S.L.W. at 4030. If plaintiffs were correct in asserting that physicians, once licensed, are constitutionally immune from regulation, then the Food and Drug Administration has no authority to prohibit physicians from prescribing narcotics or untested drugs and medicines, and Congress and state legislatures alike are powerless to protect the public health.

Defendant submits that Section 9 of the House Bill No. 1211 constitutes a reasonable regulation in furtherance of the State's compelling interest in protecting maternal health. The findings of the Missouri General Assembly that saline amniocentesis is deleterious to maternal health and that other safer mid-trimester abortion procedures are available are supported by medical evidence, and this court should defer to these legislative determinations. *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v.*

Lee Optical, 348 U.S. 483 (1955); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Sproles v. Binford*, 286 U.S. 374 (1932).

By virtue of the foregoing, the prohibition against saline amniocentesis does not interfere with the right of women to terminate their pregnancies or the ability of physicians to assist in effectuating the abortion decision. Accordingly, the judgment of the district court upholding the constitutionality of Section 9 must be affirmed.

VIII

The District Court Properly Declared Constitutional Sections 10 and 11 of House Bill No. 1211[20] Because Reporting and Record-Keeping Requirements Do Not Unduly Interfere With the Abortion Decision or the Effectuation of That Decision.[21]

Implementation of Sections 10 and 11 has no impact on the woman's decision to terminate a pregnancy or on the effectuation of that decision, nor do these sections violate the privacy of the physician-patient relationship, for any information gath-

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[20] Sections 10 and 11 of House Bill No. 1211 provide as follows:

"Section 10. 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

"2. The forms shall be provided by the state division of health.

"3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or

ered pursuant thereto must be kept confidential, as provided in Sections 10(3) and 13 of House Bill No. 1211. Because fundamental rights are not involved, the question herein is whether Sections 10 and 11 are rationally related to the state's interest in protecting the health of its citizens.

As the district court found, acquisition of data relating to abortion is essential to the advancement of medical knowledge and technology in this relatively new field of medical practice. *Planned Parenthood v. Danforth*, 392 F.Supp. at 1374. The importance of providing the means for gathering this data is highlighted by the fact that research reported in medical journals is based to a large extent upon statistical studies. Moreover, as noted by plaintiffs at page 23 of their brief, "Abortion data is now 'factual material of clear public interest.'" (See also pages 24 through 26 of Plaintiffs' Brief, and particularly page 24, wherein plaintiffs state that figures reported by the Center for Disease Control of the United States Department of Health, Education and Welfare are low because reporting is not mandatory and many abortion procedures are not reported.)

Plaintiffs contend that Sections 10 and 11 contravene the standards described in *Roe v. Wade* and *Doe v. Bolton*, because the information to be sought "applies to all abortions, regardless of gestational stage" (Plaintiffs' Brief at 127). It should be noted that provisions similar to Sections 10 and 11 were left intact in *Doe v. Bolton*, 410 U.S. at 201-202.

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reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

"Section 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years."

[21] At the time of trial no rules, regulations or forms had been promulgated pursuant to Sections 10 and 11.

Sections 10 and 11 do not single out abortion as plaintiffs suggest at page 127 of their brief. For example, physicians practicing in Missouri are required to report births and deaths (Section 193.100 and 193.140, RSMo. 1969), and communicable diseases (Sections 192.020 and 192.040 RSMo 1969). Their use of controlled substances is rigidly monitored by the state (Chapter 195, RSMo 1969).

Defendant submits that Sections 10 and 11 further the state's legitimate interest in protecting the health and welfare of its citizens. No fundamental rights are contravened by these sections, for they have no effect on the woman's decision to terminate her pregnancy or on the effectuation of that decision. Plaintiffs have failed to sustain their burden of proving that Sections 10 and 11 of the form promulgated thereunder are not rationally related to the state's interest in protecting the health of its citizens. Accordingly, the judgment of the district court declaring Section 10 and 11 constitutional must be affirmed.

CONCLUSION

As demonstrated above, House Bill 1211 represents a good faith and well-considered effort by the Missouri General Assembly to follow the guidelines of this Court in *Roe v. Wade* and *Doe v. Bolton*. In what for Missouri is the new field of legalized abortion, House Bill 1211 adapts some traditional and compelling interests of the State to the changing times. Those interests include the protection of minors, support of the institution of marriage, and preservation of the health and safety of the people.

For the foregoing reasons, Defendant prays that the judgment of the District Court be affirmed with respect to Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11, and reversed as to Section 6(1).

Respectfully submitted

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Certificate of Service

I, the undersigned appellant and a member of the Bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule 33 I have caused to be served true and correct copies of the foregoing Brief of Appellee/Appellant, John C. Danforth, Attorney General of Missouri, upon each party required to be so served by depositing said copies in a United States post office or mail box, with first-class postage prepaid, addressed to Frank Susman, Esq., 7733 Forsyth Boulevard, Suite 1100, St. Louis, Missouri 63105, and Judith Mears, Esq., Yale University Law School, 127 Wall Street, New Haven, Connecticut 06520, Attorneys for Appellees Planned Parenthood of Central Missouri, et al., and to the Honorable J. Brendan Ryan, Circuit Attorney of the City of St. Louis, Municipal Court Building, 1320 Market Street, St. Louis, Missouri 63103.

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IN THE

Supreme Court of the United States

January Term, 1975

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D.,
Appellants,

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri,
Appellees.

No. 74-1419

JOHN C. DANFORTH, Attorney General of the State of Missouri,
Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri,
Appellees.

On Appeals from the United States District Court for the Eastern District of Missouri, Eastern Division

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BRIEF AS *AMICI CURIAE* FOR PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS, INC. and CERTAIN MEDICAL SCHOOL DEANS, PROFESSORS and INDIVIDUAL PHYSICIANS

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IN THE

Supreme Court of the United States

January Term, 1975

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D.,
Appellants,

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri,
Appellees.

No. 74-1419

JOHN C. DANFORTH, Attorney General of the State of Missouri,
Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri,
Appellees.

On Appeals from the United States District Court for the Eastern District of Missouri, Eastern Division

BRIEF AS *AMICI CURIAE* FOR PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS, INC. and CERTAIN MEDICAL SCHOOL DEANS, PROFESSORS and INDIVIDUAL PHYSICIANS

Consent to Filing of Brief as *Amici Curiae*

Pursuant to Rule 42(2) of this Court, *amici* have obtained written consent from the attorneys for all parties to these cases to the filing of this brief as *amici curiae*.

Opinions Below

The opinion of the majority of the three-judge panel of the United States District Court for the Eastern District of Missouri, Eastern Division, and the opinion, dissenting in main, of Circuit Judge William H. Webster were rendered on January 31, 1975, and are reported at 392 F.Supp. 1362.

Statement of Interest of *Amici*

Planned Parenthood Federation of America, Inc.

Planned Parenthood Federation of America, Inc., also known as Planned Parenthood-World Population (Planned Parenthood), is a not-for-profit corporation organized in 1922 and existing under the laws of the State of New York. Its headquarters are in New York City. It is the leading national voluntary public health organization in the field of family planning.

Planned Parenthood has 188 affiliates in 45 states and the District of Columbia, all of them separate not-for-profit entities. These affiliates operate approximately 725 family planning clinics offering services to the public. Most affiliates offer medical services, including 19 which offer

abortion services as part of their program. Twelve affiliates are educational units without medical services. Most Planned Parenthood affiliates which do not perform abortions themselves offer abortion counseling and referral.

Planned Parenthood provides its affiliates with guidance in the areas of contraception, voluntary sterilization, infertility, abortion, sex education and education for marriage and parenthood. Each of the affiliates offering medical services functions under strict medical standards promulgated by the National Medical Advisory Committee in conjunction with local medical advisory committees. These committees are made up of health professionals, the large majority of whom are physicians.

Planned Parenthood also functions as a clearing house for information and services relating to these same areas. It formulates medical and clinical standards which are available to its affiliates and generally on a nationwide basis and develops guidelines and materials relating to public and professional education in all aspects of family planning. Its Medical Director and other consultants confer with other national medical organizations, medical school faculties and local agencies in relation to teaching techniques, formation of clinics and the like.

Many of Planned Parenthood's affiliates operate in cooperation with local public health facilities. The affiliates are also teaching and training centers for physicians, nurses, teachers and social workers from this country and foreign countries and provide referral services for their clients to qualified medical specialists and facilities.

In 1974, there were approximately 1,460,000 medical visits to Planned Parenthood clinic services. As part of these services, 26,800 abortions were performed. All of these were first trimester abortions which were performed at free standing clinics operated by Planned Parenthood affiliates.

The generally approved methods of abortion in the first trimester are suction (or vacuum aspiration) and dilatation and curettage (or D & C). See Tietze & Murstein, *Induced Abortion: 1975 Fact Book.* Reports on Population and Family Planning, No. 14, Dec. 1975 (2d ed. in press). These methods are not generally used after the first trimester (although it was recently reported that Dr. William Peterson, head of obstetrics and gynecology at the Washington, D. C. Hospital Center now performs suction abortions routinely up to the 16th week of pregnancy. *Intercom,* Vol. 3, No. 6, p. 11 (Population Reference Bureau)). Planned Parenthood believes that the medically approved techniques now in general use for abortions performed after the first trimester—saline abortion (intrauterine instillation of a saline solution), prostaglandin abortion, hysterotomy and hysterectomy—are most safely performed in a hospital setting. Such procedures are not performed at Planned Parenthood free standing clinics; Planned Parenthood affiliates refer patients to hospitals for abortion after the first trimester.

Planned Parenthood's concern with family planning and family health necessarily includes concern with the availability of abortion, including abortions performed after the first trimester of pregnancy, and with the compelling

problems resulting from restrictive abortion laws which have in the past made medically safe, legal abortions unavailable to many women. On October 19, 1974, the membership of Planned Parenthood adopted the following Policy Statement:

> "Planned Parenthood believes that the optimum method of birth planning is the consistent employment of effective contraception. However, in the event of unwanted pregnancy, abortion as a back up procedure must be available and accessible to all women.
>
> The Constitutional right of privacy includes a woman's right to seek an abortion. Planned Parenthood believes that a woman, in consultation with a physician, has the right to obtain an abortion under safe, legal, dignified conditions, and at a reasonable cost. A woman should be fully informed and counselled concerning the nature, the consequences, and the risks of the procedure. Under every circumstance, a woman should have full knowledge of the alternatives available to her when making a decision to continue or terminate a pregnancy.
>
> Abortion must always be a matter of personal choice. Planned Parenthood recognizes its responsibility to guard equally against coercion or denial in connection with a patient's decision about continuing a pregnancy. The Federation will exercise special vigilance in protecting the freedom of choice and the civil rights of those who are dependent upon either public or voluntary agencies and in protecting a woman's personal choice.
>
> No one should be denied abortion services because of age, inability to pay, or other economic or social circumstances. Public and private funds should be made available to subsidize the cost of abortion services for those who want, and need, but cannot afford them."

This commitment to the principle that safe abortions should be available to all who seek them is a necessary corollary of Planned Parenthood's activities in the area of contraception. While Planned Parenthood does not view abortion as an alternative to contraception, it recognizes that abortion services are essential to protect women where contraception is unavailable, where it has not been used for some other reason and where it has failed.

Each year a number of the patients in contact with Planned Parenthood affiliates experience unwanted pregnancies, sometimes due to contraceptive failure. Contraceptive technology has not developed to a point where there is any perfect contraceptive and many of the techniques available to particular women do on occasion fail. Consequently many unwanted pregnancies occur each year which do not involve failure to use contraceptives or lack of motivation on the part of the patient. Also, many women do not have adequate access to contraception, or when contraceptives are available do not use them effectively. There are approximately 3½ million women in the United States without access to contraceptive services (Planned Parenthood Federation of America Annual Report, 1974, p. 2, col. 2), and 35% of all births continue to be unwanted and mistimed. Alan Guttmacher Institute Report, July 1, 1973—December 31, 1974, p. 5. Throughout the United States many patients who experience unwanted pregnancies seek abortion services or referrals for such services from the Planned Parenthood affiliates.

Moreover, as will be shown in this brief, frequently women who experience unwanted pregnancies defer abortion until the second trimester. These are most apt to be (1) very young women; (2) older women who may regard a missed period as a menopausal symptom; (3) women who defer their abortions because of social problems related to poverty and minority background; and (4) users of the new medical technique of amniocentesis for the detection of genetic defects in the fetus—a technique which is effective only after the first trimester.

Planned Parenthood has a profound interest in vindicating the constitutional right of all women to abortion as established by this Court in *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* 410 U.S. 179 (1973). It is concerned that in 1973, between approximately one-half million and one million women who needed abortions were not able to obtain them. Report of Alan Guttmacher Institute on *Provisional Estimates of Abortion Need & Services in the Year Following the 1973 Supreme Court Decisions,* p. 9. Planned Parenthood is also concerned that in 1973, there were 215,800 out-of-wedlock births to women under age 20; yet, of approximately 430,000 women under age 20 who were estimated to be in need of abortion services, 186,000 were unable to secure legal abortions. *Ibid.*

Planned Parenthood believes that the judgment below, unless overturned, will have the effect of preventing many women, in Missouri and in other states which have enacted or may enact similar legislation, from obtaining needed abortion services.

Association of Planned Parenthood Physicians, Inc.

Planned Parenthood works closely with the Association of Planned Parenthood Physicians, Inc. (APPP), a New York not-for-profit corporation organized in 1974. APPP is the successor to the American Association of Planned Parenthood Physicians, an unincorporated association which was organized in 1963. In 1974, APPP had 922 members, all of whom were physicians or other health professionals associated with family planning.

APPP was formed for scientific, educational and charitable purposes and specifically to promote the ongoing interest in family planning in order to improve the stability and health of the family through responsible parenthood.

The APPP believes that the decision to undergo legal abortion must rest with the individual woman and her physician. It shares Planned Parenthood's concern about the effect of the judgment below upon the practice of good medicine as well as upon the rights of women to receive medical treatment for abortion.

Medical School Deans, Professors and Individual Physicians

The more than 80 individual physicians who as *amici* subscribe to this brief all practice obstetrics and gynecology as their medical specialty or are responsible for the education of medical students and residents, some of whom are in training in the specialty of obstetrics and gynecology.

The physicians believe that certain provisions of the Missouri statute constitute an unwarranted governmental interference with the right of physicians to administer necessary health care in accordance with their best professional judgment. Of special concern to physicians are the provisions of the Missouri statute which prohibit, after the first twelve weeks of pregnancy, the method of abortion known as saline abortion, and which make it a crime for a physician to perform an abortion which is not necessary to preserve the life or health of the mother unless the physician first certifies "with reasonable medical certainty" that the fetus is not "viable" as that term is defined in the statute.

Planned Parenthood, APPP and the individual medical school deans, professors and physicians named above, by reason of their long experience in and knowledge of the field of family planning and abortion services, believe that they are in a unique position to aid the Court in its resolution of the issues raised in this case. *Amici* have assembled relevant and recent scientific findings which are discussed herein.

Statutory Provisions Involved

Appellants challenge the constitutionality of "House Committee Substitute for House Bill No. 1211," enacted in the State of Missouri on June 14, 1974, which regulates the decision for and the medical procedure of abortion (hereinafter "the Missouri abortion statute").

With respect to arguments on the merits, *amici* will discuss only those provisions of the Missouri abortion statute

which (1) require parental consent for abortions for unmarried minors; (2) prohibit saline abortions after the twelfth week of pregnancy; and (3) define "viability" (after which abortion is prohibited except to save the life or health of the mother), since these are the questions as to which *amici* believe they are in a special position to be of aid to the Court and to provide factual material.

Amici do, however, support the arguments developed in the appellants' brief that other provisions of the Missouri abortion statute are unconstitutional. Sections of the Missouri statute which *amici* believe to be unconstitutional include Section 3(2), requiring a special type of written consent of the patient for an abortion at all stages of pregnancy; Section 3(3), requiring the written consent of a woman's spouse to an abortion; Section 7, providing that in the event of a live birth resulting from an abortion not performed to save the life or health of the mother, the infant shall be deemed an abandoned ward of the state and the rights of the parent consenting to the abortion shall be terminated; and Sections 10 and 11, requiring the completion and maintenance by physicians of certain forms and records relating to abortion at all stages of pregnancy.

In addition to the statutory provisions listed above, all of which were sustained by the court below, the Missouri abortion statute contained a provision (Section 6(1)) prescribing a standard of care which a person performing an abortion must exercise for the protection of the fetus. This section also imposed criminal and civil liability for "failure to take such measures to encourage or to sustain the life of the child" when "the death of the child results" from such failure. This section of the statute was held unconsti-

tutional by the court below for failure to exclude the stage of pregnancy prior to viability. The Attorney General of Missouri has appealed from that ruling. *Amici* believe that Section 6(1) is also unconstitutional.

Summary of Argument

In this brief *amici* present research data, as well as legal arguments, to demonstrate:

(1) The requirement of the Missouri statute that unmarried minors must have parental consent for an abortion is not supported by a "compelling interest" and is overbroad because it does not exclude minors who are sufficiently mature to give informed consent. The state interests commonly relied upon in justification of parental consent requirements for abortion are not in fact advanced by such requirements.

(2) The statutory prohibition against saline abortions after the first twelve weeks of pregnancy unreasonably interferes with the right of physicians to practice medicine as well as their patients' rights to have them use their best professional judgment. This prohibition would have the practical effect of making abortions unavailable after the first trimester, which would have especially harmful effects upon three groups of women: (a) socially disadvantaged women, mainly young, black and poor, who for certain similar reasons experience delay in obtaining abortions; (b) women who wish to make use of the new technique of amniocentesis for the detection of genetic disease; and (c) menopausal women.

(3) The Missouri statute's definition of viability, in connection with the prohibition of abortion after viability except to preserve the life or health of the woman, is unconstitutionally vague because it does not notify physicians as to what conduct on their part is prohibited. *Amici* believe that the determination of viability must be left to the treating physician and that viability must be legally defined as requiring a minimum of 24 weeks' gestation.

ARGUMENT

POINT I

The facts do not establish the compelling interest necessary to support the Missouri statutory requirement of parental consent to abortion for an unmarried minor.

Section 3(4) of the Missouri statute requires the written consent of "one parent or person in loco parentis" of an unmarried woman under eighteen for an abortion unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the woman. The constitutionality of that provision has been upheld by the court below.

Although this Court has not yet ruled with regard to a minor's right to an abortion, as the United States Court of Appeals for the Fifth Circuit recently said:

> "[A]pplication of the standard enunciated by the Court in *Roe*—the need for the right and the dire consequences of its denial—would certainly dictate the availability of the right to minors. Indeed, it would

> appear that all of the criteria of *Roe* apply with even greater force to an unwed pregnant minor: teenage motherhood involves serious consequences including adverse physical and psychological effects upon the minor and her children, the stigma of unwed motherhood, impairment of educational opportunities caused by the need to drop out of school, and numerous other social dislocations. The magnitude of the minor's interest in avoiding these consequences suggests that the developmental differences between adults and minors do not warrant denying constitutional protection to the minor's abortions.
>
> We therefore believe that the fundamental right to an abortion applies to minors as well as adults." *Poe* v. *Gerstein*, 517 F.2d 787 at 791 (1975).

This Court held in *Roe* v. *Wade, supra*, that, where fundamental rights are involved, regulations limiting these rights may be justified only by a "compelling state interest" and "legislative enactments must be narrowly drawn to express only the legitimate state interest at stake."

In *Poe* v. *Gerstein, supra*, the court pointed out that the state could arguably rely upon four interests to defend a statute requiring parental consent for abortion:

(a) preventing illicit sexual conduct among minors;

(b) protecting minors from their own improvidence;

(c) fostering parental control;

(d) supporting the family as a social unit. 517 F.2d at 792.

These interests have been discussed to varying extents in the numerous cases already decided on this issue—every one of which, with the exception of the decision ap-

pealed from, has held that parental consent requirements for abortion are unconstitutional.

Poe v. *Gerstein, supra;*
Word v. *Poelker*, 495 F.2d 1349 (8th Cir. 1974);
Planned Parenthood Association v. *Fitzpatrick*, Civ. No. 74-2440 (E.D. Pa., Sept. 4, 1975);
Baird v. *Bellotti*, 393 F.Supp. 847 (D. Mass.) U.S. appeal pending, 44 U.S. Law Week 3295 (1975);
Foe v. *Vanderhoof*, 389 F. Supp. 947 (D. Colo. 1975);
Doe v. *Exon*, CV 75-L-146 (D. Nebraska Nov. 3, 1975) (preliminary injunction issued);
Wolfe v. *Schroering*, 388 F. Supp. 631 (W.D. Ky. 1974);
Doe v. *Rampton*, 366 F.Supp. 189 (D. Utah 1973);
State v. *Koome*, 84 Wash.2d 901, 530 P.2d 260 (1975);
In re P.J., 12 Crim. Law Rep. 2549 (Mar. 28, 1973) (D.C. Super. Ct., Feb. 6, 1973).

Amici submit that there is no evidentiary support connecting a parental consent requirement for abortion with any of the interests set forth above.

A. The Requirement Will Not Prevent Illicit Sexual Conduct.

With respect to the popular notion that the availability of contraception and abortion has increased sexual intercourse among adolescents, studies have indicated little if any effect from the increasing availability of contraceptives on the incidence of premarital or extramarital sex relations; young people rarely seek contraceptive assistance until long after a pattern of sexual behavior is established. See, *e.g.*, Settlage, Baroff and Cooper, *Sexual Experience of Younger Teenage Girls Seeking Contraceptive Assistance for the First Time*, 5 Family Planning Perspectives

223 (Fall 1973); Robert C. Sorensen, *Adolescent Sexuality in Contemporary America* p. 303 *et seq.* (World Publishing 1973); Michael Schofield, *The Sexual Behaviour of Young People* (Longmans Green, London 1965). "In the face of the statistics on births out-of-wedlock it is naive and dangerous to argue that persons will refrain from sexual activity if birth control is unavailable." Stein, *Furnishing Information and Medical Treatment to Minors for Prevention, Termination and Treatment of Pregnancy*, 5 Clearinghouse Review 131 at 152 (1971).

Certainly, the statistics on sexual activity among teenagers are overwhelming. Nearly 2.4 million never-married young women in the United States aged 15-19—about 28% of all such young women—were estimated, as of 1971, to have had some coital experience. Kantner and Zelnik, *Sexual Experience of Young Unmarried Women in the United States*, 4 Family Planning Perspectives 9 (October, 1972). In a period of declining birthrates, out-of-wedlock births in the United States for women under 20 have continued to increase, numbering an estimated 150,000 in 1972. *Unwanted Pregnancy Among Single Teenagers*, A Report of Planned Parenthood Federation of America, Inc. at p. 3. Illegitimacy rates among teenagers have increased most sharply, and births to teenagers are becoming an ever larger proportion of all births. National Center for Health Statistics, DHEW (NCHS), *Interval Between First Marriage and Legitimate First Birth, United States, 1964-66*, 18 Monthly Vital Statistics Report, No. 12 (Supp. 1970); NCHS, *Summary Report, Final Natality Statistics, 1969*, 22 Monthly Vital Statistics Report, No. 7 (Supp. 1973); and P. Cutright, "Illegitimacy in the United States", 1920-1968,

in Commission on Population Growth and the American Future, *Demographic and Social Aspects of Population Growth*, C. F. Westoff and R. Parke, Jr. (eds.), Vol. 1 of Commission Research Reports, 1972, p. 375.

An attempt to turn this massive tide by requiring parental consent for abortion can only prove illusory and harmful.

B. The Requirement Will Not Protect Minors from Their Own Improvidence.

The consequences of an unwanted pregnancy can be disastrous for a teenage girl and her child. If the pregnancy is carried to term, both the mother and child face greatly increased medical risks. J. A. Menken, "Teenage Childbearing: Its Medical Aspects and Implications for the United States Population", in Commission on Population Growth and the American Future, *Demographic and Social Aspects of Population Growth*, C. F. Westoff and R. Parke, Jr. (eds.), Vol. 1 of Commission Research Reports, 1972, p. 331. *See* Day, *Factors Influencing Offspring*, 113 Am. J. Diseases of Children 179 (1967); Daniels, *Medical, Legal and Social Indications of Contraceptives for Teenagers*, 50 Child Welfare 150 (1971); Wallace, *Teenage Pregnancy*, Am. J. Obst. & Gynec. (Aug. 15, 1965); Grant, *Biologic Outcomes of Adolescent Pregnancy: An Administrative Perspective*, in Johns Hopkins Univ. School of Hygiene and Public Health, Perspectives in Maternal and Child Health (1970).

The child also has a greater chance of being physically abused or neglected if it survives. Gil, *Violence Against*

Children—Physical Child Abuse in the United States 109 (Harvard University Press 1970) (9.29 percent of abusing mothers in 1957 were younger than 20 years of age); U.S. Bureau of the Census, Current Population Reports, Previous and Prospective Fertility: 1967, 29, Series P-20, No. 211 (only 2.4% of mothers 14-44 were younger than 20).

The social consequences can be equally disastrous, as pointed out in the quoted language from *Poe* v. *Gerstein*, *supra*. Precipitate marriage, marital instability, poverty and dependency all attend an unwanted birth. According to one expert, pregnancy is the largest cause of school dropouts among teenagers in lower socio-economic groups. Hearings on S. 2108 and S. 2319 before a Subcommittee of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st and 2nd Sess. 69 (1970).

In the light of these documented hazards, it cannot be "improvident" for a pregnant unmarried minor to consult a physician about an abortion. Surely, as pointed out in *Gerstein*, the physician is in a position to counsel the minor as to the physical—and the emotional—consequences of her decision.

Any concern about the minor's ability to make an intelligent decision is met by the common law requirement that the minor—like any other patient—must give informed consent to the procedure. This would require her to be sufficiently intelligent and mature to understand the nature and consequences of the abortion procedure. See *Baird* v. *Bellotti*, *supra*, 393 F.Supp. at 854-55; *Foe* v. *Vanderhoof*, *supra*, 389 F.Supp. at 955; *In re P. J.*, *supra*.

The court below stated that children as young as ten years old have sought abortions and a child so young "cannot be presumed capable of making a decision as profound as the abortion decision without proper advice and counsel of her parents or a person in loco parentis." 392 F.Supp. at 1371. But as pointed out by the dissent, the Missouri statute does not distinguish between ten-year-olds and mature minors who are capable of giving intelligent, informed consent. 392 F.Supp. at 1376-77.* It is therefore unconstitutionally overbroad.

Instead of protecting a minor from her own improvidence, the statute operates to give her parents an absolute veto power which may be exercised for any number of reasons unrelated to the minor's welfare. The statute allows parents to refuse consent even where their judgment is colored by personal religious belief which the minor may not share, whim, or even hostility to their daughter's best interests. In *Baird* v. *Bellotti, supra,* the court found, based on the testimony of plaintiffs' experienced expert, that some parents would insist upon the continuation of their daughter's pregnancy simply as a punishment. 393 F.Supp. at 854. In that case, the minor plaintiff's father had told her, in connection with the pregnancy of a contemporary friend, that if that happened to her he would evict her and kill her boyfriend. 393 F.Supp. at 850. In *State* v. *Koome, supra,* the father of the minor woman testified that his opposition to the abortion stemmed from his belief that continuing her pregnancy to term would deter her from becoming pregnant in the future. 84 Wash. 2d at 908.

* In Missouri, the right of minors to consent for treatment related to pregnancy (other than abortion) and venereal disease is expressly recognized by statute. RS Mo. §§431.061, 431.062.

Surely giving parents an absolute veto over their daughter's right to an abortion does not serve the interest of "protecting her from her own improvidence."

C. The Requirement Will Not Improve Family Relationships.

The court below upheld the Missouri statutory requirement of parental consent for abortion on the ground that "the state's interest in safeguarding the authority of the family relationship [is] a compelling basis for allowing regulation of a minor's freedom to consent to an abortion." 392 F.Supp. at 1370.

Amici submit that the facts do not justify this conclusion.

The interests of the state in fostering parental control and safeguarding the family unit are often advanced together in support of a parental consent requirement. These interests were carefully analyzed by the Court of Appeals in *Poe* v. *Gerstein, supra,* where the court found them inadequate on two grounds. First, the court said:

> "The fact that the minor became pregnant and sought an abortion contrary to the parents' wishes indicates that whatever control the parent once had over the minor has diminished, if not evaporated entirely. And we believe that enforcing a single, albeit important, parental decision—at a time when the minor is near to majority status—by an instrument as blunt as a state statute is extremely unlikely to restore parental control. * * * If a minor's pregnancy has fractured the family structure, imposition of a parental prohibition of abortion cannot reasonably be expected to restore the family's viability as a unit." 517 F.2d at 793-4.

Second, the court in *Gerstein* reasoned that, while the privacy of the family is constitutionally protected, this protection can be justified as much by First Amendment associational values as by "the inherent rights of parents". These associational values exist not merely to protect parental authority, but also to preserve the intimacy and autonomy of the family relationship from state intrusion.

This argument was developed in a recent Harvard Law Review Note which stated:

> "Where, as in the contraceptive context, individual interests of parent and child are likely to collide, protection of their shared relational interest assumes independent importance and should not be directed at reinforcing the values of parents alone, which result when a parental consent requirement is imposed, but rather at fostering autonomous intrafamilial resolution of controversies."
>
> Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy,* 88 Harvard Law Review 1001 at 1018 (1975).

The court in *Gerstein* concluded:

> "Thus, enforcing parental control is not 'necessary' to maintain the integrity of the family unit; in fact, the integrity of the family structure could best be maintained without state encroachment upon the minor's fundamental right to abortion, if the state refrained from interfering with the family decision-making processes at all. The absence of a parental consent requirement would not portend the lack of parental input into the minor's abortion decision. Rather, in the absence of the statutory requirement, the family will resolve the problem in the manner by which the minor's problems are generally resolved: where the parent-child relationship is strong, the parent will have a great deal of input into the abortion decision; where the parent-child relationship has broken down, the parents will have less direct input. In any case, we believe that the importance of intrafamilial relationship and family privacy is sufficient to outweigh the state's interest in the enforcement of the parental prohibition." 517 F.2d at 794.

Amici have pointed out that parents frequently veto their daughter's abortion for insubstantial personal reasons unrelated to her welfare. This type of "parental control" surely does not deserve constitutional sanction, especially where its consequences are visited not only upon the daughter, but upon the new baby, which is brought into the world subject to the greatly increased physical and psychological risks documented above.*

To summarize, none of the possible interests advanced in support of a parental consent requirement for abortion meets the standard of *Roe* v. *Wade*. This is especially true because the Missouri statute treats abortion differently from any other medical procedure. The court below stated that "the requirement of parental consent * * * does not single out the abortion procedure, since it is the practice of hospitals and physicians to require that a minor's parent consent to other surgical treatment as well." 392 F.Supp. at

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* See pp. 16-17 *supra*. Additional studies have shown that, compared with legitimate children, illegitimate children suffer more frequently a variety of social, economic and health handicaps and are less likely to perform well at school. This is even more true for illegitimate children born to teenage mothers who are not prepared for parenthood either in terms of emotional or social maturity or of economic capacity. Sklar and Berkov, *Teenage Family Formation in Postwar America,* 6 Family Planning Perspectives 80 at 90 and sources cited in footnote 24 (Spring 1974).

1370. In no other context, however, is there a specific statute requiring such consent and in no other context does the failure to obtain parental consent result in criminal liability. Moreover, as pointed out above, other Missouri statutes expressly permit minors to consent to treatment for venereal disease and for pregnancy connected care (excluding abortion).

Finally, it must be said that one of the most tragic and devastating effects of a parental consent requirement is that it often has the effect of delaying a pregnant girl's abortion until the second trimester when the medical risks are far greater. Tietze & Murstein, *Induced Abortion: 1975 Fact Book*. Reports on Population and Family Planning, No. 14, December, 1975 (2d ed. in press). The statistics in the table reproduced at page 24 of this brief, *infra*, show that the methods used for abortions performed after the first trimester are far more hazardous than the suction or dilatation and curettage available in the first trimester. The difference is dramatic, with a death rate of 1.6 per 100,000 for the early abortions and a rate ranging from 15.4 (for saline abortions) to 61.3 per 100,000 for hysterotomy and hysterectomy. See also Tietze and Lewit, *Joint Program for the Study of Abortion (JPSA): Early Medical Complications of Legal Abortion*, Studies in Family Planning, Vol. 3, No. 6 (Population Council, June, 1972). Surely the state can claim no "compelling interest" nor indeed any interest at all in delaying minors' abortions until they reach the more risky second trimester.

POINT II

The statutory prohibition against saline abortions unreasonably interferes with the right of physicians to practice medicine and patients' rights to their physicians' best medical judgment; the facts about second trimester abortions and the women who need them.

A. The Statutory Prohibition Against Saline Abortions Unreasonably Interferes With the Right of Physicians to Practice Medicine and Patients' Rights to Their Physicians' Best Medical Judgment.

Section 9 of the Missouri statute challenged in this case flatly prohibits after the first twelve weeks of pregnancy "the method or technique of abortion known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor."

This section was upheld by the court below on the ground that the saline procedure is dangerous to the health of the pregnant woman. The court reached this conclusion although it was undisputed in the testimony that the mortality rate from use of saline is less than in childbirth.*

This provision of the Missouri statute represents an unprecedented and unwarranted attempt by a state legislature to decide what medical techniques a doctor may or

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* "Testimony at trial established that the mortality rate in childbirth is approximately twenty per one hundred thousand (Dr. Warren, Tr. 44; Dr. Kerenyi, Tr. 94); mortality with saline is approximately fifteen per one hundred thousand . . ." 392 F. Supp. at 1373.

may not use.* No exceptions are made for situations where the banned procedure may, in the physician's judgment, be the best or even the only method of abortion suitable for a particular patient.

Remarkably, the prohibited method of abortion is clearly not the most dangerous. A table prepared by the HEW Center for Disease Control shows that the mortality rate per 100,000 legal abortions performed in 1972 and 1973 for the various methods of abortion was as follows:

Method of Abortion	*Number of Abortions*	*Number of Deaths*	*Mortality Rate Per 100,000 Legal Abortions*
Suction/D&C	1,065,338	17	1.6
Saline	123,684	19	15.4
Hysterotomy/ hysterectomy	8,161	5	61.3
Other	5,380	1	18.6

Reported Deaths Associated with Legal Abortion in the United States, by weeks of Gestation and Method of Abortion, 1972 and 1973, U.S. Department of Health, Education, and Welfare, Public Health Service, Center for Disease Control. *Morbidity and Mortality Weekly Report* 24, January 24, 1975.

Reprinted as Table 12, *Legalized Abortion and the Public Health*, Report of a Study by a Committee of the Institute

* Judge Webster, dissenting below, pointed out:

"It is conceded that prior to the enactment of this statute, a statute mandating the application of a prophylactic solution to the eyes of newly born infants was the only known attempt by the Missouri Legislature to interfere with medical judgment in maternity cases." 392 F.Supp. at 1378.

Obviously a statute mandating a generally accepted prophylactic procedure is entirely different from one *prohibiting* a procedure widely used and endorsed by the medical profession.

of Medicine, National Academy of Sciences, Washington, D.C. May, 1975, p. 74.

The above table shows that the surgical methods of abortion—hysterotomy and hysterectomy—are almost four times as dangerous as saline abortion. Yet Missouri prohibited neither of these methods. The singling out of saline abortion for a blanket prohibition suggests that what the Legislature had in mind was not the safety of the pregnant woman at all but that of the fetus. The injection of a saline solution almost invariably results in the expulsion of a dead fetus. *Legalized Abortion and the Public Health, supra* at pp. 21-22.

In *Doe* v. *Bolton, supra,* this Court struck down a number of procedural requirements for abortion of the Georgia statute such as the requirement of committee approval, the requirement of hospital accreditation and the requirement that the performing physician's judgment be confirmed by two other licensed physicians. This Court ruled that the woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it were unduly burdened by such requirements.

The Missouri statute which prohibits saline abortions after the twelfth week of pregnancy is an even greater infringement upon the rights of the woman and the physician. The physician's right to practice his profession free from arbitrary governmental interference and the patient's right to have him do so are protected by the Fourteenth Amendment. *Roe* v. *Wade, supra,* 410 U.S. at 165; *Nyberg*

v. *City of Virginia*, 495 F. 2d 1342, 1344 (8th Cir. 1974); *Wensel* v. *Washington* (D.C. Super. Ct., No. 11004-74, Apr. 10, 1975); see also *Greene* v. *McElroy*, 360 U.S. 474, 492 (1959); *England* v. *Louisiana State Board of Medical Examiners*, 259 F. 2d 626, 627 (5th Cir. 1958), *cert. denied*, 359 U.S. 1012 (1959).

An identical statutory provision was declared unconstitutional by a three-judge federal court in Kentucky. *Wolfe* v. *Schroering*, 388 F. Supp. 631 (W. D. Ky. 1974). Pointing out that prostaglandin abortions were not readily available in Kentucky, and that hysterotomy was far more dangerous than either saline or prostaglandin abortion, the court ruled that "in order for there to be an effective, safe method, and one which is generally available for the performing of post-first trimester abortions, this section [prohibiting the use of the saline method after the first trimester of pregnancy] must be held to be invalid." 388 F. Supp. at 637.

B. The Practical Effect of Banning Saline Abortions Is to Make Abortions Unavailable After the First Trimester.

The majority in the court below based its ruling sustaining the prohibition of saline abortions upon the existence of the alternate method of injecting prostaglandin. Yet, as pointed out by Judge Webster in his dissent, prostaglandin "has only been available on a non-experimental basis for slightly more than one year. It is not now readily available. It too has counter-indications—for persons suffering from glaucoma and asthma." 392 F.Supp. at 1378. Moreover, side effects of prostaglandins at therapeutically effective doses include nausea, vomiting, diarrhea and fever.

ACOG Technical Bulletin, Induction of Mid-Trimester Abortion with Prostaglandin F2a (1974); MacKenzie, Hillier & Embrey, *Prostaglandin-Induced Abortion: Assessment of Operative Complications & Early Morbidity*, British Medical Journal December 21, 1974 at p. 683. A recent study of 122 patients who had prostaglandin abortions showed a 42.6% complication rate, and other recent reports include the observation that rupture of the cervix and cervical fistulas have occurred, perhaps with greater frequency than in saline abortions. Duenhoelter & Gant, *Complications Following Prostaglandin F2a—Induced Midtrimester Abortion*, Obstetrics & Gynecology, Vol. 46, No. 3 (September, 1975); Wentz, Thompson & King, *Posterior Cervical Rupture Following Prostaglandin-Induced Midtrimester Abortion*, American Journal of Obstetrics-Gynecology 118:210-217 (1974); Lowensohn & Ballard, *Cervicovaginal Fistula: An Apparent Increased Incidence with Prostaglandin F2a*, American Journal of Obstetrics-Gynecology 119:1057-1061 (1974). For all these reasons, saline injection rather than prostaglandin abortion is presently employed throughout the United States in approximately 75% of all abortions after the first trimester. Testimony to this effect was uncontradicted at the trial. See dissenting opinion of Judge Webster, 392 F.Supp. at 1378.

The State of Missouri offered no evidence that prostaglandin abortions are available to women in that state. The practical effect of the decision appealed from is to make abortion after the first trimester unavailable to women in Missouri in violation of their fundamental rights as set forth in this Court's decisions in *Roe* v. *Wade* and *Doe* v. *Bolton, supra.*

Although the percentage of abortions performed after the first trimester is low,* the problems which often cause women to seek such abortions are serious. *Amici* believe that it is desirable for women who seek abortions to obtain them at the earliest possible date, but they wish to direct the Court's attention to three groups of women who will suffer special hardship if abortions after the first trimester become unobtainable.

The first is the group of young women, mostly poor and many from minority groups, who form a large percentage of the women seeking late abortions. The second group, presently small in number but increasing in size so that it will be of increasing significance, consists of women who use the new technique of amniocentesis to detect whether the fetus they are carrying will be born with serious genetic disease. As will be explained below, this technique cannot be performed until the pregnancy has advanced beyond the first trimester. If second trimester abortions become unavailable, the potential of this valuable technique will not be realized. The third group is composed of older women who confuse the symptoms of pregnancy with those of menopause.

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* In both 1972 and 1973 about 83% of the abortions in the United States were performed in the first trimester. *Legalized Abortion and the Public Health, supra* at 22. As legal abortion services become readily available, the proportion of early abortions increases. See Tietze & Murstein, *Induced Abortion: 1975 Fact Book*. Reports on Population and Family Planning, No. 14, Dec. 1975 (2d ed. in press); New York City Three Year Abortion Report (1 July 1970-30 June 1973). (The total number of abortions performed in the United States during 1973 is estimated at 745,000. Report of Alan Guttmacher Institute on *Provisional Estimates of Abortion Need & Services in the Year Following the 1973 Supreme Court Decisions*).

C. Characteristics of Women Seeking Second Trimester Abortions

Women seeking second trimester abortions appear to share certain demographic characteristics and similar reasons for delay in obtaining their abortions. The delays fall into two main categories: (1) those delays caused by the woman seeking an abortion, and (2) procedural delays in the medical care system.

Tietze & Murstein state that "Late abortions occur most frequently among women of low socio-economic status, and especially among the youngest women. The strong inverse association of period of gestation and woman's age probably reflects the inexperience of the very young in recognizing the symptoms of pregnancy, their unwillingness to accept the reality of their situation, their ignorance about where to seek advice and help, and their hesitation to confide in adults. Economic considerations and, in many places, regulations prohibiting surgery on minors without parental consent also contribute to delays". Tietze & Murstein, *Induced Abortion: 1975 Fact Book*. Reports on Population and Family Planning, No. 14, December, 1975 (2d ed. in press).

In a study of over 66 institutions participating in a study from July 1, 1970 to June 30, 1971, it was found that the period of gestation which had elapsed prior to the abortion was inversely associated with the age of the woman at the time of her abortion: "the younger the woman, the more advanced her pregnancy; the older the woman, the earlier she had the abortion * * * the proportion of second trimester abortions was highest by far for the youngest

women (49%) and the lowest for women in their early 30's (20%) followed by a slight increase during the later years of the reproductive period." C. Tietze & S. Lewit, *Joint Program for the Study of Abortion: Early Medical Complications of Legal Abortion.* Studies in Family Planning, Vol. 3, No. 6, p. 102 (Population Council, June, 1972).

The suggestion in this study, that the frequency of late abortions among the young probably reflects their inexperience in recognizing the symptoms of pregnancy, their hesitation and financial insecurity, is further enunciated by Bracken and Swigar in a study of factors associated with delay in seeking abortions. They found that "women between the eleventh and twentieth weeks of pregnancy were significantly more likely to be less than 21, single, have 0 to 1 living child, be black, not have completed high school, and not to have used a contraceptive at the time of conception." They suggested that the effects of age, number of living children and marital status were relatively independent and additive, and thus a single woman who was under 21 and had no children was exceedingly prone to delay beyond the tenth week of pregnancy before seeking an abortion. Bracken & Swigar, *Factors Associated with Delay in Seeking Induced Abortions,* American Journal of Obstetrics and Gynecology 113:3, p. 301, June, 1972.

Another study found that three-quarters of the white women in the sample were aborted with suction, *i.e.,* during the first trimester, while almost half of the black women were aborted after saline infusion, leading the researchers to conclude that termination was accomplished earlier by white women. Slate and Newman, *Medico-Social Aspects*

of Pregnancy Termination, A Report of 893 Abortions, Journal of Albert Einstein Medical Center, Vol. 20, Autumn 1973.

A partial profile of women seeking second trimester abortions was recently released by New York City's Eastern Women's Center and reported in *Intercom,* a publication of the Population Reference Bureau, in its August/September 1975 issue (Vol. 3, No. 8) at p. 11. The Eastern Women's Center did 4,238 second trimester abortions in 1974. A random sample of 500 patients showed that 49% of the women were between 16 and 20 years old and 7% were between 13 and 15. Seventy-three percent had never been married, 16% were married and 11% divorced or widowed. A racial breakdown showed 69% of the patients to be white and 28% black. Of the total of 4,238 women served, only 68 (1.6%) were New York residents; the remainder came from 37 states and many foreign countries.

A recent study on *Legalized Abortion & the Public Health* prepared by a committee of the Institute of Medicine of the National Academy of Sciences describes additional research on the psychological, sociological and cultural factors involved in the decision to seek abortion. Recent work of Kaltreider examined the psychological factors involved in the delay of the decision to seek abortion until the second trimester. Kaltreider observed that women who delayed their abortions went through a period of denial of suspected pregnancy, procrastination and general emotional confusion. Nancy B. Kaltreider, *Psychological Factors in Mid-Trimester Abortion,* 4 Psychiatry in Medicine 132-133 (Spring 1973); see also H. R. Klein, *Anxiety in Pregnancy & Childbirth* (Paul B. Hoeber, Inc. 1950).

Dr. Thomas Kerenyi of Mt. Sinai Hospital in New York City and his associates interviewed random samples of 200 women obtaining D & Cs* and 200 women obtaining saline abortions in New York City hospitals from late 1971 to the middle of 1972. Kerenyi found that the second-trimester women were on the average 3.4 years younger than the D & C group, less educated, more frequently single, less often employed, and were more likely to be students. The women obtaining saline abortions were also more frequently pregnant for the first time (65% versus 44%), and thus less experienced at detecting and coping with pregnancy. While both groups expressed similar emotional reactions to the discovery of being pregnant, the women obtaining the later abortions were slower to master their feelings and proceed to action. Like Kaltreider, Kerenyi notes that in addition to ambivalence, denial of the pregnancy also seemed to contribute to the delay in seeking early abortion. Even though a large majority of both groups of women had regular menses, twice as many of the women obtaining D & Cs as salines consulted a physician after missing only one period. Thomas D. Kerenyi, Ellen L. Glascock, and Marjorie L. Horowitz, *Reasons for Delayed Abortion: Results of Four Hundred Interviews,* American Journal of Obstetrics and Gynecology 117:299-311 (October 1, 1973). It should be borne in mind also that a not insignificant number of women who seek abortions after the first trimester are those in their later childbearing years. Because many of these women experience irregular periods as a result of the onset of the menopause, many of them do not discover they are pregnant until the pregnancy is well advanced.

* Dilatation and curretage (done in first trimester only).

Finally, many women who seek an abortion find themselves enmeshed in a complex medical care system. If access to medical care is limited by age, ignorance, poverty or geography, abortion may be delayed into the second trimester while the woman attempts to master the necessary steps to obtain it. To the extent that pregnancy tests are difficult to arrange, information on abortion is limited, medical facilities are inaccessible, or pregnancy counseling is unavailable, some women will require the later procedure through no ambivalence or reluctance of their own. To date, though, no research has sorted out the extent to which such factors in the health care system influence the delay in obtaining an abortion.

Whichever of these factors is the cause—or if, as seems likely, the delay is caused by a combination of reasons—many of the women who seek abortions after the first trimester of pregnancy fall into a socially disadvantaged group. Denial of abortion to these women—the likely outcome if the judgment below is sustained—would magnify and compound the severe burdens which they already suffer.

D. Amniocentesis and Genetic Disease

"Of the four million infants born in the United States each year, approximately five percent or 200,000 are afflicted with disabling, hereditary birth defects." Friedman, *Legal Implications of Amniocentesis,* 123 U. of Pa. L. Rev. 92, 93 (1974). There is no need to cite authorities to document the burdens which defective newborns impose on families. These include medical and special care expenses, marital disruption, depression and neglect of sib-

lings, not to speak of the suffering and often death of the infants themselves.

Until recently, a couple at risk of having a child with a severe genetic disorder had two choices: to take that risk or to forego childbearing entirely. Many parents with one genetically defective child chose the latter course. See Report on *Legalized Abortion and the Public Health,* Institute of Medicine, National Academy of Sciences (May, 1975) and sources cited in footnote on page 103.

In recent years, amniocentesis and other diagnostic techniques have been used to identify an increasing number of severe genetic and congenital disorders of the fetus shortly after the first trimester of pregnancy. With prenatal diagnosis, and the opportunity to terminate an affected pregnancy by means of a legal abortion, many women who would otherwise have refrained from becoming pregnant can be helped to bear healthy children. The availability of amniocentesis and second trimester abortions probably results in a net increase in the number of live births. This is because (1) parents with one genetically defective child now feel that they can "risk" another pregnancy; (2) when a genetically defective fetus is aborted, the parents are likely to try again, so that a healthy baby is born rather than a defective one. Hence the overall effect of the availability of abortion may well increase live births among this group.

Amniocentesis is defined as "a technique for obtaining amniotic fluid by inserting a needle into the amniotic cavity. This technique may be performed in the early second trimester for purposes of detecting genetic defects • • •"

Battelle Columbus Laboratories, *Final Report on an Assessment of the Role of Research Involving Living Human Fetuses in Advances in Medical Science and Technology* to National Commission for the Protection of Human Subjects, Dep't of Health, Education & Welfare, March, 1975, p. 30.

The critical time for the performance of amniocentesis is between the 17th and 20th post-menstrual weeks of pregnancy. (Before that time, there is usually not enough amniotic fluid to obtain an adequate sample and injury to the fetus may result from an effort to draw some fluid.) See Friedmann, *Prenatal Diagnosis of Genetic Disease,* 225 Sci. Am., Nov. 1971 at 37. Once the amniotic fluid has been drawn, it is centrifuged to isolate cells which are then grown in a culture medium for two to four weeks. Since the length of time required to complete the procedure and analysis is four to six weeks, the pregnancy will inevitably be in the 20-22nd week before a final diagnosis is made. If abortion follows immediately, it will be late in the second trimester.

More than six thousand pregnancies have been monitored in the United States and Canada between 1967 and 1974 by means of amniocentesis. A survey shows that less than ten percent of the diagnoses disclosed an affected fetus, thus ruling out the choice of abortion for the great majority of parents at risk. The diagnostic accuracy was close to 100% and complication rates were about two percent. See Aubrey Milunsky, *The Prenatal Diagnosis of Hereditary Disorders,* Springfield, Illinois: Charles C. Thomas Publishers, 1973, p. 37, and Table 18 at page 106 of the Institute of Medicine *Report on Legalized Abortion &*

the Public Health, supra; see also M. Gertner, L. Hsu, J. Martin & K. Hirshorn, *The Use of Amniocentesis for Prenatal Genetic Counseling,* Bulletin of the New York Academy of Medicine, Vol. 46, No. 11, 1970, p. 116.

At present, certain chromosomal disorders and about fifty inherited diseases associated with enzyme deficiencies are amenable to prenatal diagnosis. The following brief description of two of these disorders is taken from the Friedman article in the University of Pennsylvania Law Review cited above.

Down's Syndrome (mongolism) is the most common congenital anomaly, having an incidence of one in six hundred live births. Ninety-five percent of all Down's Syndrome children are severely mentally retarded. Half have congenital heart disease.

Tay-Sachs Disease is an autosomal recessive condition characterized by blindness, severe mental retardation and death, usually before three or four years of age. It is most common in Jews of central and eastern European origin, among whom it has an incidence of one in every 3,600 births.

The *New York Times* on May 23 of this year reported an article in the May issue of the New England Journal of Medicine which stated that physicians can now sample fetal blood as well as amniotic fluid to detect hereditary blood diseases such as sickle cell anemia and Cooley's anemia. Sickle cell anemia affects one in 400 babies born to black Americans; its frequency is high in certain other groups, the evidence being that it is most common among people whose ancestors lived in areas with a high incidence

of malaria. Cooley's anemia, also known as beta-thalassemia, afflicts mainly people of Mediterranean, Middle Eastern and Southeast Asian descent. Both sickle cell and Cooley's anemia greatly shorten the life expectancy of their victims. *New York Times,* May 23, 1975, p. 38, col. 1.

Not all pregnant women will or need to seek screening of genetic disorders in the fetus, but those who can be identified as at risk of giving birth to an infant with a severe genetic disorder and who would consider an abortion if an affected fetus were detected can be greatly helped by such screening. These include pregnant women who: (1) previously had a child with a severe genetic defect if it is recognizable *in utero;* (2) have been identified as carriers of a chromosomal aberration or whose husbands have been identified as such; (3) have been identified as carriers of a severe metabolic disorder and whose husbands are also carriers; (4) have been exposed to infectious diseases, drugs or radiation that might be harmful to the fetus; and (5) are beyond 35 or 40 years of age and therefore run a greatly increased risk of having a child born with Down's Syndrome or other defects. At age 40-44 a woman's risk of having a Down's Syndrome baby is 23 times greater than the risk faced by a woman less than 20 years of age. After age 45, the probability of a Down's Syndrome child becomes one out of every 50 births. Institute of Medicine, *Report on Legalized Abortion and the Public Health,* p. 107.

On June 24, 1975, the *New York Times* reported that a committee of the National Research Council on June 23 endorsed the practice of genetic screening as a valuable aid to public health and deserving of nationwide use. A report was issued by the National Academy of Sciences,

parent body of the National Research Council, supporting the use of genetic screening on a voluntary basis to prevent needless suffering and human and economic waste. Yet such screening serves no purpose unless the pregnant woman has the option of obtaining an abortion if the test reveals abnormality.

The results of a major Government-sponsored study of amniocentesis for the detection of genetic defects were announced at the 44th annual meeting of the American Academy of Pediatrics on October 20, 1975. Sponsored by the National Institute of Child Health and Human Development, the study involved 1,040 women who had amniocentesis performed and 992 pregnant women who did not. According to a summary of the data, which were compiled by nine major medical institutions,* the study "showed no significant adverse effects on the women undergoing amniocentesis; and no significant differences in rate of fetal loss, prematurity, newborn status, birth defects or developmental status at one year of age."

Of the 1,040 women who had amniocentesis, 34 were found to have fetuses with an abnormality. In addition, 11 were found to have male fetuses each having a 50% risk of a disorder such as hemophilia or muscular dystrophy. Thirty-five of these 45 women elected to have abortions, including eight whose fetuses were identified as having the chromosomal abnormality that goes with Down's Syn-

* Children's Memorial Hospital, Chicago; Eunice Kennedy Shriver Center, Boston; Johns Hopkins School of Medicine; Mount Sinai School of Medicine; University of California at Los Angeles (Harbor General Hospital); University of California School of Medicine, San Diego; University of Michigan School of Medicine; University of Pennsylvania School of Medicine and Yale University School of Medicine.

drome. Seven of the 992 women who did not have amniocentesis had babies afflicted with Down's Syndrome. *New York Times,* October 21, 1975, p. 46, col. 5.

The Institute of Medicine's *Report on Legalized Abortion and the Public Health, supra* (at p. 107), cites figures showing the huge financial outlays associated with the care of children with severe genetic disorders. It takes an average of about $5,000-$6,000 per year to pay the cost of institutional care for a retarded individual. The 50,000 persons now receiving institutional care for Down's Syndrome alone represent an expense of $250-$350 million per year. The issue, however, is not one of dollars and cents but of social and psychological cost and suffering. The financial data alone tells only a very small part of the human tragedy represented by the birth of defective infants rather than healthy ones.

Unless the judgment below is reversed, abortions will for all practical purposes be unavailable in Missouri after the first trimester. This will not only prevent a group of especially disadvantaged women from obtaining needed abortions (see pages 29-33, *supra*) but could curtail the entire program of genetic screening and amniocentesis for the detection of genetic abnormalities. *Amici* believe this would be a tragic setback to medical progress.

POINT III

The definition of "viability" in the Missouri statute is unconstitutionally vague; the facts about viability.

Section 5 of the Missouri abortion statute provides:

> "No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable."

Section 2(2) defines "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems."

Section 14 makes any person who performs an abortion contrary to the provisions of the act guilty of a misdemeanor.

These three sections place upon the physician who performs an abortion a heavy burden, not imposed, so far as *amici* are aware, on any physicians performing any other medical or surgical procedures. As to a gestation of less than twenty-four weeks, the statute is so clearly unconstitutional under *Roe* v. *Wade* that *amici* will not in this brief go beyond stating that conclusion. With reference to abortions after more than twenty-four weeks of gestation, up to and including somewhere between the 24th and the 28th week of gestation, the requirement that the physician certify "with reasonable medical certainty" that the fetus is not viable is also clearly unconstitutional since the statute sets no firm or clear guidelines, and the physician

must determine the fact of viability or non-viability at his peril. However soundly his judgment is based, he can be second guessed by a judge and jury, and if they find that he was wrong, he is subject to criminal penalties. It is clear that in such circumstances physicians will be "chilled" into not doing an abortion at all unless the fetus is clearly of a gestation far less than twenty-four weeks. In other words, although *Roe* v. *Wade* held that during the period from the end of the first trimester to viability, the state may legislate only in the interest of the pregnant woman, the effect of the Missouri statute is to deter physicians from performing any abortions during this period.

Amici believe that the Missouri statute's requirements as to viability fly in the face of this Court's holding (as summarized by a three-judge court holding a Minnesota statute unconstitutional) that "as between cases the point of viability will vary, and whether or not the fetus is in fact viable must be left to the medical judgment of the physician. In any event, under present technology, it does not arise prior to twenty-four weeks." *Hodgson* v. *Anderson*, 378 F.Supp. 1008, 1016 (D. Minn. 1974), *app. dismissed sub nom. Spannaus* v. *Hodgson*, 42 L. Ed. 2d 832, Jan. 27, 1975.*

It is *amici's* position that viability may not be considered in connection with any pregnancy of less than twenty-four weeks' duration and that the physician's judgment as to viability after that cannot be made the basis of criminal liability if he should turn out to have been wrong.

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* This Court ruled that the appeal properly belonged in the Court of Appeals for the Eighth Circuit. Argument was heard in that court on May 12, 1975, and a decision is pending.

The determination which the physician is required to make during the period after twenty-four weeks is not a simple one. Indeed, a three-judge federal court which recently invalidated a similar definition of viability on constitutional grounds pointed out that "a preponderance of the evidence supports a finding that there is not a consensus within the medical community as to the gestational age at which viability occurs." *Planned Parenthood Association* v. *Fitzpatrick*, Civ. No. 74-2440 (E.D. Pa., September 4, 1975), slip opinion at p. 24.

Amici hereby offer for this Court's consideration research data showing that the diagnosis of viability is a complex predictive matter incapable of any precise or fixed definition and involving many factors in addition to gestational age. It is made extremely difficult by the limits on the information available to the physician at the time he must make the decision. "The physician's estimate of the weight of a 600-gram fetus *in utero* may be consistent with delivery of a 1000-1200 gram premature infant." Behrman & Rosen, *Report to the National Commission for the Protection of Human Subjects, infra,* at p. 23 (March, 1975). Yet the Missouri statute subjects the physician who performs an abortion to criminal penalties if a jury—after the abortion and with the benefit of a great deal more information about the fetus, including its weight and measurements—should decide that his decision that a fetus is nonviable (which he thinks he made with "reasonable medical certainty") was wrong.

A. The Scientific Data

The Report to the National Commission for the Protection of Human Subjects, prepared by Dr. Richard Behrman and Dr. Tove Rosen of the Columbia-Presbyterian Medical Center and a panel of distinguished consultants in March, 1975 (hereinafter referred to as the "Behrman-Rosen Report") contains a mass of statistics from all over the world about the survival rates of infants in relation to their birth weight and gestational age. Although it is not possible to summarize all of those statistics here, a few salient points should be noted:

In no instance did a reported infant survive who weighed less than 601 grams and was of a gestational age of 24 weeks or less. Behrman-Rosen Report, p. 27.* Where infants weighed 1000 grams or less, the chances of survival ranged from 1 in 276,531 (for a weight of 601-650 grams) to 1 in 14,554 (for a weight of 951-1000 grams). Behrman-Rosen Report, pp. 6-7. Despite major improvements in the technology and care of premature infants, an infant of 25 weeks' gestational age has no better chance of surviving than 3.6 out of 1 million. Behrman-Rosen Report, p. 12.

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* There is considerable variation in birth weight at different gestational ages. The following appears as Table 2 of the Behrman-Rosen Report:

Estimated Weeks of Gestation	*Recorded Birth Weights in Grams*
22	460-600
23	550-950
24	500-850
25	600-1000
26	400-925
27	630-1050
28	680-1000

Based on all their data, Drs. Behrman and Rosen formulated the following guidelines for viability:

> "A fetus or prematurely delivered infant is biologically viable when a minimal number of independently sustained, basic, integrative physiologic functions are present. In order for the fetus or infant to be viable the sum of these functions, considered together, must support the inference that the fetus or premature infant is able to increase in tissue mass (growth) and increase the number, complexity and coordination of basic physiologic functions (development) as a self-sustaining whole organism. This must be independent of any connection with the mother and when receiving only generally accepted medical treatment. If, in sum, these coordinated functions are not present, the fetus or prematurely born infant is biologically nonviable since it is incapable of being made able to exist as a self-sustaining whole organism independently of any connection with the mother. This may be the case even though some signs of life are apparent.

At this time (March, 1975) the following functions taken together constitute the minimal number of basic integrative physiologic functions:

1. The perfusion of tissues with adequate oxygen and the prevention of the increasing accumulation of carbon dioxide and/or lactic and other organic acids. This function consists of these components:

(a) inflation of the lungs with oxygen,

(b) transfer of oxygen across the alveolar membranes into the circulation and the elimination of carbon dioxide from the circulation into the expired gas, and

(c) cardiac contractions of sufficient strength and regularity to distribute oxygenated blood to tissues

and organs throughout the body and to eliminate organic acids from those tissues and organs.

2. Neurologic regulation of the components of the cardio-respiratory perfusion function, of the capacity to ingest nutrients, and of spontaneous and reflex muscle movements.

The foregoing minimal basic integrative physiologic functions cannot at present be separately assessed in the fetus or prematurely delivered infant in a consistent, reliable and exact manner. The absence of the sum of these minimal functions, however, can be assessed indirectly in a reasonable and reliable manner by measurement of weight and/or an estimation of gestational age, since specific weights and gestational ages correlate with a lack of potential for subsequent sustained extrauterine growth and development (survival). In this biologic sense, fetuses or prematurely delivered infants of less than 601 grams and/or of 24 weeks or less gestational age, may be considered nonviable. At these weights and gestational ages signs of life such as a beating heart, spontaneous respiratory movement, pulsation of the umbilical cord and spontaneous movement of voluntary muscles are not adequate in themselves to be used to determine the existence of these minimal basic integrative functions, e.g., the heart may continue to beat for as long as 30 minutes after removal from the body.

In addition, regardless of weight and gestational age, the minimal number of basic integrative physiologic functions to sustain subsequent extrauterine growth and development (survival) are not present in fetuses or prematurely delivered infants with:

1. severe malformations of the central nervous system, such as anencephaly;

2. severe grotesque multiple system malformations, such as cyclops; and

3. severe fetal asphyxia or anoxia when there has been no response to manual resuscitation according to the existing medical practice.

In contrast, a weight of 601 grams or more or gestational age of 25 weeks or more may indicate that the minimal number of basic integrative physiologic functions necessary for independent growth and development is present. Such a fetus or prematurely delivered infant may be considered biologically viable". Behrman-Rosen Report, pp. 66-69.

It is noteworthy that the most recent research on this subject, done by Dr. Dominick Purpura of Albert Einstein Medical School of Yeshiva University, who also is Director of the Rose Fitzgerald Kennedy Center, indicates that viability should be placed at the time when the fetus first develops the capacity for human intelligence. Dr. Purpura has questioned the current definition of viability, which reflects a view that the heart is the central organ of life. He states that, if the brain is given that role—as it increasingly has been in deciding when death occurs—then determination of viability of a fetus should be delayed by at least four weeks. Evidence for the development of brain life during the specific period of the 28th to 32nd week is based on correlation of results of brain wave, visual and other physiological tests with autopsy studies of premature infants that died despite treatment in an intensive care unit. See *New York Times,* May 9, 1975, p. 36.

The above data indicates that the complex determination of viability can be made only by a physician and that "certainty"—probably even "reasonable certainty"—is impossible. The data also makes it clear that a fetus of a gestational age of less than 24 weeks is not viable; although

viability is a complex concept including many factors other than gestational age, there were virtually no reports of infants of less than 24 weeks who survived. Indeed, of the thousands of cases studied, there were only two reports of infants surviving at less than 24 weeks, one a 21 week gestation weighing 879 grams and the other a 22 week gestation weighing 999 grams. "When the gestational ages of these infants were re-evaluated, it was noted that the gestational ages listed were taken from the obstetrical records of the referring hospital and were probably inaccurate. The birth weights do not correlate with the aforementioned gestational ages. According to the intra-uterine growth charts these infants were about 26 weeks and 26½ to 27 weeks respectively." Behrman-Rosen Report, p. 29.

With reference to abortions after 24 weeks, it is clear that the requirement that a physician "certify with reasonable medical certainty that the fetus is not viable" imposes on the physician an impossible task—in and of itself and for the further reason that whatever and however soundly based his "certification" may be, he is always susceptible of being second guessed by a jury and found guilty of a criminal offense.

B. "Viability" Is Impossible of Definition "with reasonable medical certainty."

Amici submit that a criminal statute must give physicians some clear guidelines so that they will know what conduct on their part is prohibited. As stated by Mr. Justice Marshall in *Grayned* v. *City of Rockford,* 408 U.S. 104 at 108-9 (1972):

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are

not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to '"steer far wider of the lawful zone" * * * than if the boundaries of the forbidden areas were clearly marked.'" [footnotes omitted].

Amici maintain that the statute's requirement of "certification with reasonable medical certainty" of non-viability is unconstitutionally vague and void on its face. In *amici's* opinion, in the present state of the art and the science of medicine, the state legislatures may not put physicians, as this statute does, in the position of performing all abortions after the first trimester at their peril.

Amici are, therefore, reluctant to put forward any definition of "viability" since the concept itself cannot be made the basis of a finding of guilt or innocence. However, if this Court considers that viability may be made the test of guilt or innocence in connection with the performance of

a constitutionally protected procedure, *amici* state that, based on the available data, the question of viability cannot be said to arise earlier than 24 weeks of gestation. *Amici* believe that a fetus should not be considered viable unless it has a statistically significant chance of survival. Therefore *amici* submit that legislation implementing this Court's decisions in *Roe* v. *Wade* and *Doe* v. *Bolton* which seeks to prohibit abortions after viability except to preserve the life or health of the mother must set the lowest limit at which viability may be deemed to occur at the 24-week period.

Of course, even at 24 weeks the data shows the likelihood of survival to be infinitesimal, with the survival statistics rising as pregnancy progresses until they reach 50% at approximately 28 weeks' gestation. See Behrman-Rosen Report, pp. 13-15. Figures 4, 5 and 6. *Amici* believe that an abortion performed prior to 24 weeks must be conclusively presumed to be of a non-viable fetus, that after 24 weeks, the physician doing the abortion procedure is the only one who can make the determination of viability, and that his determination must be final and not reviewable by a lay jury under threat of criminal penalties.

At least two courts have held that the determination of viability must be left for final determination by the physician doing the procedure. *Hodgson* v. *Anderson, supra; Wolfe* v. *Schroering*, 388 F. Supp. 631 (W.D. Ky. 1974).

In *Hodgson* v. *Anderson, supra*, a three-judge court declared unconstitutional many provisions of a Minnesota abortion statute including one that "during the second half

of its gestation period a fetus shall be considered potentially viable".

In *Wolfe* v. *Schroering, supra,* a three-judge Federal court upheld a section of a new Kentucky abortion statute which provides that once a fetus may reasonably be expected to have reached viability, no abortion shall be performed except in order to preserve the life or health of the mother. The court said:

> "Viability cannot be determined by the state; the decision is a medical one and must be left to the professional medical judgment of the woman's physician just as in any other medical procedure." 388 F.Supp. at 637.

Amici know of no other situation, *i.e.,* other than abortion, where any legislature, federal, state or local, has made the subject of a criminal penalty a diagnosis by a physician which turned out to be incorrect, nor has any legislature required a physician to "certify" any opinion of his "with reasonable medical certainty." If the Missouri statute here under attack is constitutional, even if applied only to abortions after 24 weeks, henceforth legislatures will presumably be free to require physicians, on pain of criminal penalties, to "certify with reasonable medical certainty" any other diagnosis, *e.g.* cancer, appendicitis, etc. On a parity of reasoning, if a physician "certified" that the patient did not have cancer, for example, and it turned out subsequently that he did, then a jury could find that the physician's diagnosis had not been made "with reasonable medical certainty" and send him to jail.

On September 4, 1975, a three-judge statutory panel of the United States District Court for the Eastern Dis-

trict of Pennsylvania declared unconstitutional the definition of viability in the Pennsylvania abortion statute. *Planned Parenthood Association* v. *Fitzpatrick,* Case No. 74-2440. That statute defined viability as "the capability of a fetus to live outside of the mother's womb albeit with artificial aid." 35 PS §6602 (Purdon's Supp. 1975-76). The statute imposed civil and criminal liability on a physician who either (1) failed to make a determination, prior to performing an abortion, that the fetus was not viable, or (2) having determined that the fetus might be viable, failed to exercise a high degree of care to preserve the life and health of the fetus in the process of performing the abortion. 35 PS §§6605(a); 6605(d) (Purdon's Supp. 1975-76).

The court held the definition of viability void for vagueness, saying:

> "We find that the Abortion Control Act's definition of viable is vague because it does not notify physicians as to what conduct on their part is prohibited." Slip opinion, p. 27

The court accepted the plaintiffs' argument that the vagueness of the definition of viability subjected them to possible arbitrary and discriminatory prosecution, stating in its opinion:

> "We believe that such a danger exists here for, without an objective standard to guide law enforcement officers, prosecutors and courts, physicians will be subject to prosecution controlled only by the subjective determinations of those charged with law enforcement. The possibility of such arbitrary enforcement certainly will, as plaintiffs contend, inhibit and deter physicians from performing abortions after a fetus has reached the gestational age of 20 weeks. Such a limitation prior to the 24th week of gestation

> is inconsistent with the fundamental right of a pregnant woman to obtain an abortion without regard to the potential for fetal life within the second trimester of the pregnancy. We find that the Supreme Court in *Roe* intended to set the lowest limit at which viability may be deemed to occur at the 24 week period. Accordingly, we hold that Section 2's definition of viability, Section 5(a) of the Act, which incorporates that definition, and Section 5(d), which imposes civil and criminal sanctions, are inconsistent with *Roe*, and are therefore unconstitutional." Slip opinion, pp. 28-29.

Amici urge this Court to declare unconstitutional the section of the Missouri statute defining viability on the basis of *Roe* v. *Wade, supra,* and for the reasons set forth above and in the *Fitzpatrick* case.

Conclusion

For the reasons stated in this brief and in the brief of the appellants, *amici* respectfully urge that this Court reverse the judgment of the three-judge court below insofar as it held constitutional Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11 of the Missouri abortion statute and affirm the judgment of that court insofar as it declared unconstitutional Section 6(1) of the Missouri abortion statute and enjoined enforcement of that section.

December 4, 1975

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IN THE

Supreme Court of the United States

October Term, 1975

Nos. 74-1151 and 74-1419

PLANNED PARENTHOOD OF CENTRAL MISSOURI, et al.,

Appellants,

—vs.—

JOHN C. DANFORTH, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF AMICUS CURIAE ON BEHALF OF THE CENTER FOR CONSTITUTIONAL RIGHTS AND THE WOMEN'S LAW PROJECT

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STATEMENT OF INTEREST

The CENTER FOR CONSTITUTIONAL RIGHTS is a non-profit, tax exempt, educational and charitable corporation organized under New York law, and dedicated to advancing and protecting the rights and liberties guaranteed by the Bill of Rights to the United States Constitution. Since 1969, the Center has been at the forefront of the legal struggles of women to liberate themselves from the bondage of discriminatory and oppressive laws.

In particular, the Center played an instrumental role in the litigation leading up to the Supreme Court's landmark decision recognizing women's right to abortion in Roe v. Wade, 410 U.S. 113 (1973), and in successfully defending that decision against the legal offenses of the anti-abortion forces seeking to nullify and undermine that right.

The WOMEN'S LAW PROJECT is a non-profit, feminist legal organization in Philadelphia, Pennsylvania, working for the legal equality of women through litigation, public education, research and the representation of local women's groups. The Project is concerned with the implementation of state laws affecting women and their impact on the effectuation of a just transition to a system in which the legal rights and obligations of both sexes are equally recognized in all areas of life. Amicus is particularly expert in the interplay of laws which equalize opportunities for women in general with those delineating the rights and obligations of marriage and reproductive freedom.

Both the CENTER FOR CONSTITUTIONAL RIGHTS and the WOMEN'S LAW PROJECT view the emancipation of women from the stereotyped roles of the past as a critical

priority of this decade. Fundamental to this goal is the recognition and implementation of woman's right to abortion. Equally fundamental is the repudiation by the law of the land of the cage of paternalism which has relegated woman to second-class status in both the public and domestic spheres of life.

Amici see the assertion of state power to enforce a husband's veto over a woman's choice to abort, as inimical to the emancipation of women and as a repudiation of the important steps taken by this Court in its recent decisions in the area of reproductive control and equal protection to break the chains inherited from the past.

In this brief, amici draw upon their expertise and understanding of the blatant and subtle causes and forms of women's second-class status, particularly as respects the status of woman in the institution of marriage to illustrate for this

Court, the constitutional impermissibility of a rule which would subject a woman, in a matter so fundamental to her liberty, to the control of her husband.

QUESTION ADDRESSED

Whether Section 3(2) of House Bill 1211 which empowers husbands to veto the wife's decision to abort violates her rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments and authorizes involuntary servitude in violation of the Thirteenth Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

This Court's recognition in Roe v. Wade of the right of a woman to abortion, inhering in liberty and privacy guaranteed by the Fourteenth Amendment, must preclude the exercise of state authority to condition her choice to abort on the consent of her husband. The condition of marriage does not deprive her of her inalienable and fundamental individuality and personal right to control her body and reproductive capacity.

No compelling state interest has or can be demonstrated to override her personal choice. The State has no power to promote procreation in marriage generally, or because of the desire therefor of the husband. Nor can the State justify such power as promoting marital harmony.

For the State to enforce the will of the husband against the wishes of the wife in so fundamental a sphere is reprehensible. To tolerate such subjugation of her body and will to his desires necessitates and transcends even the limits of the husband's control over the wife as embodied in the common law of "coverture" and its vestiges which viewed woman as the property of her husband and premised marital harmony on the obliteration of her separate identity and will. To enforce the husband's will would repudiate not only the right to abortion but this Court's rejection, under the Equal Protection Clause, of sex-discriminatory statues and stereotypes.

The husband's own right to procreate does not entitle him to use an unwilling spouse's body for that purpose. The inviolability of the woman's right to abort may temporarily or permanently frustrate his own right to procreate in the context of that relationship, but the harm to him is incomparable to that of the woman irrevocably forced to undergo an unwanted pregnancy and nurture, perhaps, an unwanted child. To legally sanction his veto power would be to subject a woman to involuntary servitude.

ARGUMENT

I. THE RIGHT OF A WOMAN TO TERMINATE HER PREGNANCY IS A PERSONAL RIGHT WHICH CANNOT BE CONDITIONED ON THE CONSENT OF HUSBAND OR FATHER, WHETHER BY STATUTE OR COURT RULE.

The Amici here address the constitutionality of Section 3(2) of House Bill 1211 which requires that a woman obtain her spouse's consent before she may obtain an abortion.*/ The court below sustained this incursion on a woman's right to determine whether to have a child on three bases, a) the state's interest in insuring the reproductive capacity of

*/ Amici believe that other challenged sections of House Bill 1211 are also unconstitutional but we will not address this brief to those sections to avoid unnecessary duplication of matters addressed by other amici. We wish to note, that if §3(2) requiring the woman's own written consent is being utilized by the State of Missouri to deter a woman from obtaining an abortion it is unconstitutional. This court must distinguish such a burden on abortion from the importance of insuring that no surgical procedure be performed on a woman, or man, without the patient's informed consent, particularly in the area of reproductive freedom.

marriages, b) the assumption that procreation and mutuality of decision making foster trust and strengthen marital harmony and by implication, c) the husband's interest in the survival of a particular fetus. Planned Parenthood of Central Missouri v. Danforth, 372 F. Supp. 1362, 1370 (E.D. Mo. 1975). As Amici will demonstrate below, the lower court's decision ignores or distorts the rulings of this Court, constitutes an intolerable throwback to feudal notions of woman and marriage and is contrary to common sense.

Regardless of the euphemisms employed by the State of Missouri in seeking to justify its violation of a woman's most fundamental right to control her reproductive life, this Court cannot ignore what is at stake herein. For Missouri has here stated that a husband can force a woman against her will to endure nine months of pregnancy, expose herself to the life and death risks of childbirth and be respon-

sible for the rearing of a child for nearly two decades.

The implications for a woman of pregnancy and childbirth were vividly described by Judge Lombard writing for the three judge district court in Abele v. Markle, 342 F. Supp. 800, 801-2, vacated and remanded on question of mootness, 410 U.S. 951.

> The decision to carry and bear a child has extraordinary ramifications for a woman. Pregnancy entails profound physical changes. Childbirth presents some danger to life and health. Bearing and raising a child demands difficult psychological and social adjustments. The working or student mother frequently must curtail or end her employment or educational opportunities. The mother with an unwanted child may find that it overtaxes her and her family's financial or emotional resources. The unmarried mother will suffer the stigma of having an illegitimate child. Thus, determining whether or not to bear a child is of fundamental importance to a woman. (Emphasis supplied).

It is an inescapable reality that no matter how much a husband may care for his

child the very process of pregnancy and childbirth places burdens on a woman from which he is free.

Echoing Abele in Roe v. Wade, 410 U.S. 113 and Doe v. Bolton, 410 U.S. 739, this Court specifically recognized the right to abortion as uniquely a woman's right:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. 410 U.S. at 153.

For such reasons, this Court concluded that laws which restrict a woman's right to abortion, except in carefully delineated ways, violate a woman's constitutional right to privacy, which:

> whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's preservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. 410 U.S. at 153 (emphasis supplied).

Although the Court expressly refrained from ruling on the husband's possible rights with respect to the abortion decision, it is quite clear from the above that the privacy right described is not a marital right arising from a distortion of Griswold v. Connecticut, 381 U.S. 479 that can be imposed on the woman, but a personal right as further described by this Court in Eisenstadt v. Baird, 405 U.S. 438:

> It is true that in Griswold the rignt of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. (single underlining added).

That personal right harks back to that discussed by this Court in Union Pacific R.R. Co. v. Botsford, 141 U.S. 250, the case

which opens the discussion of privacy in Roe v. Wade. In Botsford,this Court stated:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law. 141 U.S. at 251.

On the basis of Wade, Bolton, and their predecessors, state and federal courts throughout the country, with the single exception of the court below have uniformly concluded that a husband or father cannot interfere with the woman's privacy right to determine whether to bear a child, whether under the aegis of state law or merely on his own whim.

Thus where a husband sought the assistance of state courts to bar his wife's abortion in the absence of state statute, the Supreme Judicial Court of Massachusetts barred the husband's interference. The Massachusetts court scrutinized the nature

of the privacy right found by this Court to form the basis of the fundamental right to abortion. Looking back to Meyer v. Nebraska, 262 U.S. 390, 399; Pierce v. Society of Sisters, 268 U.S. 510, 535; Griswold v. Connecticut, supra, 381 U.S. at 496, and Loving v. Virginia, 388 U.S. 11, 12, the court stated:

> . . . all those cases involved a shield for the private citizen against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens. See Moose Lodge No. 107 v. Irvis, 407 U.S. 167, 172 (1972); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). We find no basis for the husband's assertion that the Constitution enables him to summon the Commonwealth to help him in a dispute with his wife. Doe v. Doe, S-7885 (S.J.C. Mass., 1974), slip. op. p. 5.

See also Ponter v. Ponter, #C-3599-74, Super. Ct. N.J. (June 9, 1975), p. 5 quoting approvingly , the Massachusetts court's analysis of the privacy right in a case upholding a woman's right to be sterilized without her husband's consent.

The District Court of Appeals of the State of Florida in the case of Jones v. Smith, 278 So.2d 339, 344 (Fla. App. 1973) rejected the efforts of a putative father seeking to enjoin an abortion, stating:

> Could a potential putative father (or for that matter a husband) seek an injunction to restrain the woman from using contraceptives or compel the woman to bear children? Such circumstances would be ludicrous. It is unquestioned that a woman has a fundamental right to determine whether or not to bear children, see Young Women's Christian Association of Princeton, N.J. v. Kugler, supra, and it would be beyond the province of logic and reason to suggest that she could be compelled to procreate.

Although the court in Jones v. Smith was considering the assertion of right by a putative father where the state statute purported to guarantee the "rights" of husbands, the court made it clear above that neither husband nor father could veto a woman's right to an abortion.

Ruling directly on the constitutionality of that Florida statute, the three-

judge federal court in Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1973) held unconstitutional a provision such as that challenged herein on the theory that since the State cannot prohibit a woman from obtaining an abortion during the first two trimesters of pregnancy

> It follows inescapably that the State may not statutorily delegate to husbands and parents an authority the State does not possess. 376 F. Supp. at 698.

See Wolfe v. Schroering, 388 F. Supp. 631, 636 (W.D. Ky, 1974) holding that a woman's right to terminate her pregnancy cannot be conditioned on the consent of others, at least during the first two trimesters. See also Doe v. Rampton, 366 F. Supp. 189 (D. Ut. 1973).

It is clear from the above that at least during the first two trimesters of pregnancy */ the right of a woman to decide

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*/ Amici contend that although under the rulings of this Court the state can elect to restrict her right to abortion in the third trimester, the husband can never compel her to become his beast of burden.

whether or not to terminate her pregnancy is a personal right and not a family right governed by the will of husband or father.

II. THERE IS NO COMPELLING STATE INTEREST WHICH JUSTIFIES VESTING IN THE HUSBAND THE POWER TO CONTROL A WOMAN'S BODY AND LIBERTY BY REQUIRING HER TO PROCREATE.

This Court has recognized that the right to decide whether to bear a child is a fundamental right, which only a compelling state interest can override. Roe v. Wade, supra, 410 U.S. at 155. There is no basis on which this Court can find the state has a compelling, indeed even permissible interest, in conditioning a woman's right to abortion on the consent of her husband (or the putative father).

The Court below suggested three interests to justify the requirement of husband's consent: a) the interest in the future reproductive capacity of marriages; b) the interest of the husband in the survival of a particular fetus*/; and c) the

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*/ The District Court itself appears uncomfortable with this contention, as well it should be, because it implies that he has some sort of property interest in the product of conception.

assumption that procreation and mutuality of decision-making fosters mutual trust and strengthens marital harmony*/.

Whether these interests are viewed from the perspective of a general state interest in fostering procreation and harmony in marriage or from the perspective of a state interest in enforcing the husband's particular expectations against the wife's desires, the assertion of state power to guarantee the husband's control must be viewed as insufficient, irrational and, indeed, as a reprehensible and impermissible extension of the common law subjugation of the married woman to her husband's will.

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*/ Danforth, supra at 1370.

A. A State Interest in Encouraging Procreation In The Marriage Relationship Has Been Rejected As Insufficient.

In Griswold v. Connecticut, 381 U.S. 479, this Court recognized the right of married couples to use contraceptives free of state sanction. Significantly, the state did not even assert as its object the encouragement of procreation in marriage,*/ and such an interest, had it been asserted, would most surely have failed the test in view of the Court's recognition of a realm of privacy surrounding marriage guaranteed against the exertion of state power. supra at pp. 482-486 and 486-499 (Goldberg, J., concurring). Justice Goldberg addressed the question of state power to impose such a

*/ "There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself, or that the anti-use statute is founded on any policy of promoting population expansion. supra, at 505 (White, J., concurring).

rule to promote procreation by inverse analogy:

> While it may shock some of my brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control would also be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

It is accordingly clear that the State cannot assert, in its own right, an interest in fostering procreation or protecting the procreative capacity of the marriage. And as will be demonstrated hereinafter, the State cannot intrude into the marriage relationship to protect the procreative expectations of one partner thereof. Just

as the prohibition on contraception voided in Griswold was deemed one "having a maximum destructive impact on the relationship," supra at 485, because it would have subjected the couple to state-imposed procreation, so the assertion of a state interest in preserving harmony in the relationship is completely irrational and counterproductive of "a harmony in living," supra at 486, where state power is exercised to allow the husband to force upon his wife an unwanted pregnancy.

B. There Is No Compelling, Let Alone Permissible State Interest In Enforcing The Husband's Will Over That of The Wife.

The question is then, given an irreconcilable difference between husband and wife respecting a reproductive decision or risk, does the State have a compelling interest or right which justifies according primacy to the husband's desire? The spectre of the State effectuating in one person such an awful power over another is even more "repulsive" than was the state-imposed prohibition on contraception struck down in Griswold, supra, at 486.

The interests asserted by the State and accepted by the District Court for sustaining the husband's veto power over the wife's decision to abort must be understood as a distorted vestige of the common law institution of marriage which sanctioned the subjugation of the wife -- body and will -- to her husband. In that light,

and in light of the recent recognition by this Court of the historic discriminatory and oppressive treatment of women by the law, the power asserted here must be decisively rejected. See Frontiero v. Richardson, 411 U.S. 677 (1973).

The statement of Mr. Justice Brennan in Frontiero, supra at 684, that "an attitude of 'romantic paternalism' . . . in practical effect, put women not on a pedestal but in a cage," is nowhere more applicable than to the legally sanctioned supremacy of the husband in the traditional marriage relationship. However painful it may be to acknowledge the subjugation which was rationalized by paternalistic romanticism, it is a critical step to implementing the liberty and equality of woman.

1. The Interests Proferred By The District Court Constitute An Extension Of The Repugnant And Eroded Doctrine Of The Married Woman As Femme Coverte And Chattel Of Her Husband.

To tolerate a statute which permits a husband to force a woman, against her will, to continue an unwanted pregnancy whether it be because of some asserted interest in the particular fetus or in the "future reproductive capacity of the marriage," revives the concept embedded in the common law of the woman's body and services as the property of her husband. To contend that the subjugation of a woman's choice in a matter so fundamental to her life serves to preserve marital harmony, resussitates the fiction of "coverture" which exalted the obliteration of any separate will and identity for the wife.

Historical legal analysis demonstrates, however, that notwithstanding the immense control accorded to the husband by legally

sanctioned presumptions and custom, the veto power contended for here is one which was not accepted even by the common law.

a) Coverture

Coverture flowed from the biblical description that man and woman become "one flesh" upon marriage.*/ As described in the Commentaries of Blackstone**/, coverture meant that

> the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover she performs everything . . .

While Blackstone praised the disabilities of coverture as protections for the benefit of the woman, concluding that "so great a favorite is the female sex of the Laws of England," (Id. at 445), another man of letters, Alfred, Lord Tennyson, characterized a woman's status before her husband more accurately, as "something better than his dog, a little dearer than his horse." (Locksley Hall 1842).

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*/ Genesis ii, 22-23.

**/ Blackstone's Commentaries 441 (21st Ed. Wendell 1852).

Under coverture, the "one person" recognized in the status of marriage was the person of the husband alone. A woman's property came under the control of her husband, subject to his management, and, at times, his absolute right to alienation. A woman who married was not allowed to convey real property, nor could she sue or be sued without the joinder of her husband. In addition, she was not allowed to contract except under special and limited circumstances, and criminal acts done by her in the presence of her husband were deemed to be his responsibility alone.*/ Although the law ascribed to the wife the responsibility for the rearing of children, even they were seen as the property of the husband. For example, absolute custody of the children rested in

*/ A fuller discussion of the incidents of coverture can be found in Kanowitz, Woman and the Law, 36 et seq.

the husband, to the extent of excluding women even from visitation with them absent a husband's consent.*/

The subjugated condition of the married woman and its necessity to family harmony was exalted in Justice Bradley's now repudiated dissent in Bradwell v. Illinois, 83 U.S. (16 Wall) 130:

> The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views

*/ The husband's absolute control and guardianship over the children was one of the main points of protest in early feminist documents. See, for example, the marriage document signed by Henry B. Blackwell and Lucy Stone in 1855 (found in Kraditor, Up From The Pedestal 149-50 (1968)and in the Declaration of Sentiments adopted at Seneca Falls in 1848 at the first women's rights convention (Id. at 185-188), in which the husband's dominance over the children is renounced. See also 1 Blackstone's Commentaries 445 (21st Ed. Wendell 1852).

> which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state. . .
>
> (emphasis supplied)

b) Vestiges of Coverture

This feudal notion of a woman as, at best, a frail subject of her husband's wishes, and, at worst, no more than an addition to his assets has not yet been entirely wrenched from legal thought. While many of the incidents and disabilities of coverture have been eroded by legal reform, particularly in the area of property rights and commercial transactions*/, the notion that the wife is the husband's possession has died

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*/ The Married Women's Property Acts, enacted in both England and the United States in the latter part of the Nineteenth Century generally restored to women

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much more slowly in those areas touching more personally on the marriage relationship.

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the right to contract, sue and be sued, and to manage and control their separate estates and earnings during marriage.

Typical of the married woman's property reform laws of this period was one first enacted by Missouri in 1889:

> Mo. Stat. Sec. 451.290. A married woman shall be deemed a femme sole so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity, with or without her husband being joined as a party . . .

The term "femme sole" was a common legal fiction created to explain the actions of a married woman operating as if single. Apparently, the notion of a married woman simply acting on a par with men as an individual, without such a fictional veil, was beyond the vision of legislators.

While control over marital property remained largely with husbands as well into this century, recent legislation has been aimed at finally eliminating all male prerogatives over jointly-held property and at securing judicial recognition of a stay-at-home spouse's equitable interest in the accumulated property of a wage-earning spouse upon

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1. Woman's Name

Symbolic of the wife's loss of self-identity and society's perception of her as but an adjunct of her husband has been the tradition and laws surrounding married women's names. While the common law never required women to adopt their husband's surnames at marriage, the custom generally prevailed, and continues to prevail today to a lesser extent, that women automatically assume their husband's last, and often, first, names for their own primary identification.*/ As a result, numerous statutory restrictions developed with regard to women's name.**/

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dissolution of the marriage. See, e.g. Johnston, "Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality," 47 NYU L. Rev. 1033, 1070-1086 (1972) and Younger," Community Property, Women, and the Law School Curriculum," 48 NYU L. Rev. 211, 230-240 (1973); The Uniform Marriage and Divorce Act, 9 Uniform Laws Anno. §307 (1973) and Ariz. Rev. Stat. Ann. §25-214 (1956) as amended in 1973; Cal. Civ. Code §5125 (West 1970), as amended in 1973; Idaho Code §39-912 (Supp. 1970), as amended in 1974; N.M. Stat. Ann. §57-4A-7 (1953), as amended in 1975 and Wash. Rev. Code Ann. §26.16.030 (196_), as amended in 1972. See also, United States v. Dege, 364 U.S. 51, rejecting the view that husband and wife are one person, and therefore cannot be held to conspire to violate the criminal law.

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*/ For a brief discussion of the common law of names and customs which have developed regarding married women's names, see, MacDougall,"Kruzel: A Landmark Names Case," 1 Women Law Reporter 1.207 (1975).

**/ See, e.g. Stuart v. Board of Supervisors of Elections for Howard County, 266 Md. 440, 295 A. 2d 223 (1972), which successfully challenged a Maryland re-registration requirement for newly-married women, without regard to an individual woman's choice to retain her birth given name. By contrast, in Forbush v. Wallace, 405 U.S. 970, 92 S. Ct. 1197 (1972), this Court summarily affirmed an Alabama practice requiring married women to register for a driver's license in their husband's surname, distinguishable perhaps since Forbush herself stipulated that the common law of Alabama did require women to adopt their husband's name upon marriage.

The law of names also embodies the common law concept of the child as the husband's property. Many states, which provided that a married woman's name could be changed upon divorce, made an exception where there were minor children of the marriage.*/ Though the common law leaves to the parents the choice of a child's name, married women are faced with official resistance when they attempt to give their children a surname other than that of the father. Unmarried women, on the other hand, meet resistance in attempts to give their children the name of the father, rather than their own last name. Both practices underscore the strong "property" interests assigned to men's names, and the attendant privileges associated with being

*/ See,e.g. Code §25-4-47 (1967) and Wis. Stat. §247.20(1957). By contrast, see Application of Lawrence,133 N.J. Super. 408,337 A. 2d 49 (App. Div. 1975); Petition of Hauptly,312 N.E. 2d 857 (Sup. Ct. Ind. 1974); and Kruzel v. Podell, 67 Wis. 2d 138, 226 N.W. 2d 458 (Sup. Ct. 1975).

a particular man's, rather than woman's child.*/

ii. Woman's Domicile

The wife's lack of separate identity and control was embodied also in the doctrine, still extant in a majority of jurisdictions, that her domicile automatically follows that of her husband, regardless of her own actual or intended residence.**/ Forcing a married woman to assume the domicile of her husband jeopardizes a variety of rights including voting, access to the courts of a particular jurisdiction and access to special tax rates and to tuition

*/ Both these problems have been corrected by the State of Pennsylvania's new health regulations relating to the designation of a child's name. 28 Pa. Code §§1.6 and 1.7, 5 Pa. Bulletin 2926-27 (November 8, 1975).

**/ Kanowitz, Women and the Law 46-52 (1969). See, e.g. Tate v. Tate, 149 W. Va. 591, 142 SE 2d 751 (1965). There is now a move to amend the law of domicile. See, e.g. Colorado Rev. Stat. Ann. §14-2-210 (1973). See also, Green v. Comr. of Corporations and Taxation, 305 NE 2d 92, Mass. Adv. Sh. 1972, 1461, 1466.

reductions at state-supported schools. The unquestioned supremacy of the male choice is reflected in decisions granting a husband a divorce on grounds of desertion for his wife's failure to acquiesce in his choice of domicile.*/

iii. Woman's Obligation To Serve

The traditional law of marriage has also made women almost completely subject to their husband's rule with respect to their maintenance and support. The law assigns to the husband the duty of financial support and the wife, that of provision of domestic services and sexual relations. The wife's services are presumed to be gratuitous and money provided for support and necessaries may not be returned by her

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*/ See, e.g. Dunning v. Dunning, 325 S.W. 2d 315 (1969).

unless she can show the husband specifically intended it as a gift.*/ Moreover, notwithstanding a wife's steadfast performance of services, the courts, on the theory of non-interference in an ongoing marriage, refuse to recognize the legitimacy of a wife's claim of non-support.**/

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*/ See, e.g. Hardy v. Hardy, 235 F. Supp. (D.D.C. 1964), where, upon dissolution of the marriage, Mrs. Hardy was denied the value of a portion of her weekly allowance which she had saved and invested in securities. Recognizing that she could have used this money to pay for domestic services or to provide more generously for her own needs, the Court held nonetheless:

> Acquiescence in these expenditures (for personal needs) does not indicate an acquiescence in the use of such funds for the creation of a portfolio of securities for the wife's own account. To hold otherwise would be to invite disruptive influences in the home. (emphasis supplied)

**/ Perhaps the most celebrated example of a court's refusal to intervene on behalf of a wife claiming non-support during an ongoing marriage is the case of McGuire v. McGuire, 157 Neb. 226, 59 NW 2d 336 (1953). Despite her 33 years of doing farm and domestic work with none of the basic household necessities like running water and despite his substantial assets, the Court held that "the living

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As Blanche Crozier, writing about the legal status of women in 1935, noted, this inability of a wife to enforce the support-services exchange, short of marital dissolution, simply strengthens the perception of the wife as the husband's property during marriage:

> This is precisely the situation in which property finds itself; it may be overworked and underfed, or it may be petted and fed with cream, and that is a matter for the owner to decide. Whether the wife will get much or little is no matter of her legal right but is a matter for the husband to decide. */

The husband's legal control was and is still reinforced by the economic and social relegation of woman to the domestic sphere.

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standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf. As long as the home is maintained and the parties are living as husband and wife, it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out."

*/ Crozier, "Marital Support," 15 Boston Univ. L. Rev. 28 (1935). A similar sentiment was expressed

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iv. Woman's Sexual Obligation

Laws which engender a sense of ownership by a man over his wife have been particularly blatant in the area of sexual relations. Until very recently, no American

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by Ernestine Rose, a leader in the campaign for Married Women's Property Acts in 1851: "But it will be said that the husband provides for the wife, or, in other words, he feeds, clothes, and shelters her! I wish I had the power to make everyone before me realize the degradation contained in that idea. Yes! he keeps her, as he does a favorite horse; by law they are both considered his property. Both may, when the cruelty of the owner compels them to run away, be brought back by the strong arm of the law . . . This is humiliating indeed, but nevertheless true; and the sooner these things are known and understood, the better for humanity. It is no fancy sketch. I know that some endeavor to throw the mantle of romance over the subject, and treat women like some ideal existence, not liable to the ills of life. Let those deal in fancy, that have nothing better to deal in; we have to do with sober, sad realities, with stubborn facts."

"Again I shall be told that the law presumes the husband to be kind, affectionate, and ready to provide for and protect his wife. But what right, I ask, has the law to presume at all on the subject? What right has the law to intrust the interest and happiness of one being into the hands of another? And if the merging of the interest of one being into the other is a necessary consequence of marriage, why should the woman always remain on the losing side? Turn the tables . . ." Rose, "On Legal Discrimination" (1851), found in Kraditor, Up From the Pedestal, 222, 225-6 (1968).

jurisdiction recognized a woman's right to seek legal redress against her husband for non-consensual sexual activity, as the marriage contract is seen as allowing a man to use the body of his wife as his own desires dictate*/.

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*/ Traditionally, rape laws have defined the victim as any woman other than the wife of the perpetrator of non-consensual sexual relations, denying wives a cause of action under the criminal law. He is guilty of rape, only if he participates or assists another man in raping her. See Perkins, Criminal Law 152 (2nd ed. 1969). Two recent cases in Israel, El Fakir v. Attorney General, (1964) vol. 4, 18 P.D. 200 and Katib v. Attorney General, (1966) vol. 2, 20 P.D. 136, have, however challenged the assumption, virtually universal in the western world, that forced intercourse is one of a woman's matrimonial duties:

> In my view, this doctrine does not do justice to the dignity of man nor to the dignity of matrimony. . . A wife is not like a 'captive taken with the sword' (Gen. xxxi, 26) in her husband's house and she has the same right of corporal freedom as he . . . El Fakir, supra at 219.

In 1975, South Dakota became the first state to deliberatly amend its rape law to include in its victim class the wife of a perpetrator. SDCL §22-22-1.

On the other hand, should a husband, who discovers his wife engaging in sexual relations, kill the "trespasser," he is excused from criminal liability though his wife would not be*/. Finally, under the common law of torts, men, but not women, have traditionally been able to collect damages for loss of consortium, which includes loss of both domestic services and sexual relations**/.

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*/ See Kanowitz, supra, at 92-93, for examples of such laws and a policy discussion of their sex-based discrimination.

**/ A majority of jurisdictions now extend consortium rights to wives, as well, largely through the influence of case law such as Hitaffer v. Argonne Co., 183 F. 2d 811 (D.C. Cir. 1950).

c) Critical Limitations
On The Husband's Control

While the control accorded the husband over the wife by the traditional laws of marriage was nearly absolute, the courts balked at being used as an instrument to secure to the husband affirmative control over his wife's body and health against her wishes.

Thus, although a woman could not and almost universally cannot invoke the criminal law of rape to punish her husband for forcible sexual intercourse, he could not invoke the civil law to force her to have intercourse with him. Rather, her refusal to have intercourse has been treated as a ground for annulment or divorce based on constructive abandonment*/. Nor could one spouse

*/ See, e.g. the recent decision, Dudzick v. Dudzick, (N.Y. Sup. Ct. Suff. Co., November 7,1975), 44 U.S.L.W. 2243 (December 2, 1975).

compel the other to have uncontracepted sexual intercourse against his/her will to effectuate the expectation of progeny. Even when procreation was viewed as a primary goal of marriage and sexual activity, the courts would not compel it, but rather recognized it as a cause for dissolution of the marriage.*/ Dissolution and not forced procreation is likewise the only permissible legal solution for a woman's exercise of her right to abortion against her husband's will.

Closely related is the court's traditional unwillingness to recognize a legal right in the husband to veto medical care and treatment chosen by the wife. The wife's consent to medical treatment has been recognized as sufficient to authorize care.

*/ See, e.g. Kreyling v. Kreyling, 20 N.J. 52, 23 A. 2d 800 (1942).

The rule is stated in Am. Jur. 2d §161 that

> [a] married woman in full possession of her faculties has power, without consent of her husband, to submit to a surgical operation upon herself, and he has no inherent power to consent to a dangerous operation on her.

Thus, the wife's consent to treatment has been held to defeat a husband's claim that, absent his consent, he was entitled to damages or to avoid financial liability for the services rendered.

In Janney v. Housekeeper, 70 Md. 162, 16 A. 382 (1888), the Court rejected the husband's claim that doctors who removed his wife's breast because of malignancy were liable for tort because he had consented to the operation only if the tumor was benign, stating at 383:

> . . . if she consented to the operation, the doctors were justified in performing it, if, after consultation, they deemed it necessary for the preservation and prolongation of the patient's life. Surely the law does not authorize the husband to say to

> his wife, 'You shall die of Cancer: You cannot be cured, and a surgical operation, affording only temporary relief, will result in useless expense.' The husband had no power to withhold from his wife the medical assistance which her case might require.

The same theory of recovery was propounded and rejected in 1967 in Jeffcoat v. Phillips, 417 S.W. 2d 903 (Tex. Civ. App. 1967), wherein the Court wrote at page 906:

> . . . Appellants also contend to the effect that because there was no proof that Mr. Jeffcoat gave his consent to the operations in question performed on his wife, that coverture was a bar to a valid legal agreement on the part of the wife to consent to the operations in question. . . Appellants cite no authority in support of such proposition, and we have found no authority to support such a proposition. . . . A person does not fall within the classification of 'property' and Mrs. Jeffcoat, a person, had the right to consent to the operations in question if she chose to do so, and her husband's consent was not necessary . (emphasis supplied) */

*/ See also Carstein v. Hanselman, 61 Mich. 426 (1886); Karp v. Cooley, 493 F. 2d 408 (5th Cir. 1974).

Even where, as here, the medical treatment at issue related to the wife's reproductive capacity and was claimed by the husband to deprive him of desired offspring, the law refused to require his consent. Thus a husband was denied damages in tort for an illegal abortion, performed in opposition to his wishes where the wife consented thereto.*/ Moreover, where the treatment complained of was hysterectomy, which irrevocably terminates her childbearing capacity, the courts refuse to condition her right to treatment on the husband's consent. In Murray v. Vandevander,**/ Okla. App. 522 P. 2d 302, the court stated at 304:

> In his petition, plaintiff sought recovery for damage to his 'right to reproduce another child.' We have found no authority and plaintiff has cited none which holds that the husband has a right to a child-bearing wife as an incident to their marriage. We are neither prepared to have a fertile wife nor to allow recovery for damage to such a right. We find that the right of a person who is capable of competent consent to control his own body is paramount. (Emphasis supplied)

We see, therefore, in the area of medical treatment, even that affecting reproduction, a refusal of the law to invest one partner to a marriage with the right to consent or veto treatment sought by the other. Nothwithstanding the breadth of legally sanctioned male supremacy in the institution of marriage, attempts of husbands to assert control in this area have been viewed with a special abhorrence, based as they are on the concept of woman as his disposable property, and subject to his whims alone.

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*/ See, Herko v. Utrillo, 203 Misc. 108,114 N.Y.S. 2d 618 (Sup. Ct. 1952).

**/ See also Pratt v. Davis, 118 Ill. App. 61, 79 N.E. 562 (1906).

2. The Husband's Veto Is Patently Impermissible and Irrational.

There have been moments in the history of this Court's work where power asserted by the State to dominate or interfere with personal lives and decisions has demanded rejection as plainly intolerable and offensive. See e.g. Griswold v. Connecticut, supra; McLaughlin v. Florida, 379 U.S. 184, at pp. 291-292 (Stewart, J., concurring). The husband's consent provision here presents just such an occasion.

Given the practical reality that spousal consent for abortion is, in fact, the husband's right to cancel out a woman's free exercise of abortion choice, the court's stated concern with "the integrity of the marriage unit" seems little more than a thinly-veiled rationalization for assigning ultimate sway over marital planning and harmony to men. Furthermore, delegating to men the authority to preserve "a

fetus" or "the future reproductive capacity of the marriage" simply strengthens the perception of the woman and her body as a proprietary interest of her husband. As such, these or any other proffered bases for the right of consent represent an alarming throwback to a feudal mentality of male supremacy in both the public and domestic spheres of decisionmaking.

For this Court to sustain the spousal consent provision would be not only a virtually precedented extension of the traditionally recognized sphere of the husband's power, but also a repudiation of the important steps taken in its recent decisions to foster the emancipation and equality of women. Eisenstadt v. Baird, supra; Roe v. Wade, supra; Reed v. Reed, 404 U.S. 71 ; Frontiero v. Richardson, supra; Taylor v. Louisiana, ___U.S.___, 95 S. Ct. 704; Weinberger v. Wiesenfeld, ___U.S.___, 95 S. Ct. 1225; and Stanton v. Stanton, __U.S. ___, 95 S. Ct. 1373.

As demonstrated above, the common law's refusal to interfere in an ongoing marriage, has, in light of the multifarious presumptions of the civil and criminal law, left women, who had little choice of alternative means of survival outside of a marriage relationship, subject to the will of their husbands. To depart from the doctrine of non-interference here would be very bizarre indeed. As the Supreme Judicial Court of Massachusetts wrote in Doe v. Doe, supra at p. 5:

> Except in cases involving divorce or separation, our law has not in general undertaken to resolve the many delicate questions inherent in the marriage relationship. We would not order either a husband or a wife to do what is necessary to conceive a child or to prevent conception, any more than we would order either party to do what is necessary to make the other happy.

To interfere here does not promote harmony of spouses, but rather consigns the pregnant married woman to the most

fundamental, irrevocable and inescapable debasement to his will and deprivation of her liberty.

The impact on a woman's liberty of being forced to endure an unwanted pregnancy is incomparable to the impact of her decision to abort on the husband's personal right to procreate. His desire for progeny may be temporarily or perhaps permanently frustrated in that relationship, but it is not abrogated or even significantly impaired and he may be entitled to dissolution of the relationship. Moreover, his personal desire to procreate does not entitle him to use an unwilling spouse's body for that purpose. As discussed by a noted constitutional scholar, to accord him this power would perpetrate a new form of involuntary servitude of woman to man:

> [G]ranting a man the power to force someone to carry and care for his child despite her unwillingness to use her body and life for that

purpose would raise the specter of the legally enforced physical and psychological domination of one group in society by another. A woman in contemporary America who is coerced into submitting herself, at the insistence of a man empowered by law to control her choice, to the pains and anxieties of carrying, delivering, and nurturing a child she did not wish to conceive or does not want to bear and raise, is entitled to believe that more than a play on words has come to link her forced labor with the concept of involuntary servitude. It would, of course, be far-fetched to suggest that the Thirteenth Amendment's prohibition of "slavery" and "involuntary servitude" confers upon women a right to abortion so as to avoid compelled motherhood. But it would be equally insensitive to the deepest meaning of that character of emancipation completely to deny its relevance as a source of guidance in assessing an allocation of roles that embodies the coercive domination of one group by another.

Tribe;"Forward: Toward A Model Of Roles In The Due Process of Law and Life,"87 Harv. L. Rev. 1, 40.

The relevance of the Thirteenth Amendment here is underscored by the parallels between the subjugation of the married woman and the institution of slavery, rec-

ognized by this Court in Frontiero v. Richardson, supra, at 685. The practical and psychological impact of role-typing on a woman's opportunities, expectations and ultimately, on the achievement of equality was sensitively discussed last term in Stanton v. Stanton, supra, 95 S.Ct. at 1378. Here the impact of enforcing spousal veto far transcends the private realm:

> To give men the unreviewable power to sentence women to childbearing and childraising against their will is to delegate a sweeping and unaccountable authority over the lives of others. Any such allocation of roles would operate to the serious detriment of women as a class, given the multitude of ways in which unwanted pregnancy and unwanted children burden the participation of women as equals in society. Even a woman who is not pregnant would inevitably be affected by her knowledge of the power relations thereby created. (fn. omitted)

Tribe, supra at 41.

The impact of giving primacy to the husband's wishes would not only deprive a

wife of her fundamental right to abortion, which right is itself fundamental to her ability to achieve equality in society; it would also enshrine in a penultimate sense the domination of men over women.

For all these reasons, the spousal consent provision, like the prohibition on voluntary contraception, must be rejected as "repulsive," reprehensible and impermissible *per se*.

CONCLUSION

Wherefore, this Court must reverse the District Court and invalidate Section 3(2) of House Bill 1211.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, *et al.*, *Appellant*,

vs.

JOHN C. DANFORTH, ATTORNEY GENERAL OF MISSOURI, *et al.*

No. 74-1419

JOHN C. DANFORTH, ATTORNEY GENERAL OF MISSOURI, *Appellant*,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, *et al.*

On Appeals From The United States District Court For The Eastern District of Missouri, Eastern Division

---

Motion for leave to file a brief with brief as amici curiae for: D.C. Right to Life Committee (Washington, D.C.); Families For Life (Ronkonkoma, New York); Feminists for Life, Inc. (Columbus, Ohio); Fredericksburg Chapter of the Virginia Society for Human Life; Health Personnel Concerned for Life (Minnesota); Legal Defense Fund For Unborn Children (Alexandria, Virginia); Long Island Coalition For Life (New York); March for Life (Washington, D.C.); Joseph Mauro, State Pro-Life Chairman, Maryland State Council, Knights of Columbus; Missouri Citizens for Life (Jefferson City, Missouri); Passaic County Chapter of the New Jersey Right to Life Committee; Prince George's County Right to Life (Maryland); Prince George's County Voters For Life (Maryland); Diocesan Union of Holy Name Societies of Rockville Centre (Oceanside, New York); Scientists For Life, Inc. (Fredericksburg, Virginia); South Dakota Right to Life Corporation (Sioux Falls, South Dakota); Texas Right to Life, Inc. (Austin, Texas); Virginia Right to Life (Springfield, Virginia); Women For The Unborn (Merrick, New York).

(Amici continued on inside cover)

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On Appeals From The United States District Court For The Eastern District Of Missouri, Eastern Division

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Motion For Leave To File A Brief Amici Curiae On Behalf Of The Named Organizations, Petitioners, And Individuals In Support Of The Attorney General Of Missouri.

The interest of the amici is to protect the constitutional rights of unborn persons. For example, the March For Life is an incorporated, nonprofit, national right to life group that organizes the annual mass march to the nation's Capitol on January 22 to present the inalienable right to life of unborn persons to the American people. The amici collectively represent over sixty thousand persons.

The questions of law raised by the amici have not been raised by the parties. The amici brief presents newly discovered evidence which indicates that the Supreme

Court rested its abortion decision, *Roe v. Wade*, 410 U.S. 113, upon erroneous factual evidence. In other words, this new research indicates that if the Supreme Court had been informed of this new evidence, then it could not have reached the conclusion in *Roe v. Wade*, but rather would have been compelled to uphold the constitutionality of the Texas criminal abortion statute.

Since one of the amici did this extensive legal research and since the results have not yet had wide public distribution and discussion, the amici are the only parties capable of presenting this new evidence to the Court. Since the purpose of an amicus curiae brief is to present to a court "legal matter which has escaped its notice, and regarding which it appears to be in danger of going wrong," *Black's Law Dictionary* 107 (4th ed. 1968), an amicus brief appears indispensable in this case. Counsel for Planned Parenthood of Central Missouri has denied consent to file this brief.

This newly discovered evidence is relevant to the case because if the judicial proceedings prove that *Roe v. Wade* rests upon factual errors, then it appears that *Roe v. Wade* will have to be overruled. In that eventuality, there could be no question that the State of Missouri has the power under the Constitution to protect the lives of unborn persons by the statute that was in existence prior to *Roe v. Wade*.

Respectfully submitted,

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Amici Curiae Brief On Behalf Of The Named Organizations, Petitioners, And Individuals, In Support Of The Attorney General Of Missouri.

INTEREST OF THE AMICI

The interest of the amici has already been stated in the accompanying motion.

SUMMARY OF ARGUMENT

The amici contend that newly discovered evidence indicates that *Roe v. Wade* rests upon factual errors which require the overruling of that case.

ARGUMENT

The purpose of this brief is to present, in outline form only, the evidence that appears to establish that *Roe v. Wade*, 410 U.S. 113, rests upon factual errors. Since the research documentation is too voluminous and detailed to reproduce here, a copy has been placed in the file of this case. See EXHIBIT A: EVIDENCE FOR JUDICIAL NOTICE CONCERNING *ROE v. WADE*. (Hereinafter cited as "Exhibit")

A. IN *ROE v. WADE*, THE COURT TOOK JUDICIAL NOTICE OF EVIDENCE THAT IS FACTUALLY WRONG.

Key factual errors concern the purpose of the criminal abortion statutes, existing at the time the Fourteenth Amendment was adopted, to protect the lives of unborn children. If the purpose of all those criminal abortion statutes was to protect the unborn child, and if nothing in the Fourteenth Amendment indicates an intent to overrule those abortion statutes, then as Mr. Justice Rehnquist pointed out in his dissent, it shows conclusively that the Fourteenth Amendment did not withdraw from the states the power to protect the lives of the unborn by criminal abortion statutes.

The Supreme Court avoided this conclusion by holding that all these criminal abortion statutes, existing at the time the Fourteenth Amendment was adopted, were intended to protect the life of the mother, and not the life of the unborn child. To reach this conclusion, the Supreme Court made the following errors:

1. The Supreme Court made the unqualified factual assertions that during the 19th century, when the criminal abortion statutes were being enacted, (1) "the [abortion] procedure was a hazardous one for the woman," *Roe v. Wade*, 410 U.S. 113, 148 and (2) that "Abortion mortality was high." *Roe v. Wade*, 410 U.S. 113, 149. These two factual assertions are not true.

The 19th century authorities in obstetrics, not only in America, but also in virtually the entire western world, during the entire time these abortion statutes were being enacted, from 1802 until the adoption of the Fourteenth Amendment, wrote in their obstetric texts that the abortion operation was not hazardous to the life of the mother and their mortality statistics indicate that abortion was no more hazardous to the life of the mother than childbirth. See Exhibit 1-8. This obstetric evidence is extensive and seemingly indisputable. Of course, the abortions described in these 19th century texts were performed to save the life of the child and/or the mother. See Exhibit 5 nn.8 & 9.

2. The Supreme Court cited one single text as authority for its two erroneous assertions that the abortion procedure per se was hazardous for the woman and abortion mortality was high. This was *A Hundred Years of Medicine* 19 (1943) cited in *Roe v. Wade*, 410 U.S. at 148 n.43. This medical history book merely stated in a short chapter entitled "18th Century Surgery And Its Limitations," that in those early days the dangers of infection made major surgery in the chest, the head and the abdomen hazardous to the patient. The book did not make even one single reference to the abortion operation; it was merely a general survey book. On the other hand, the 19th century obstetric textbooks, written to instruct physicians and medical students in obstetric procedures, described the abortion operation and its effects upon the woman in precise detail, and based upon the authors' own direct experiences, stated that the abortion operation was not hazardous to the life of the mother; and the mortality statistics gathered from around the world indicated that abortion was no more hazardous to the life of the mother than childbirth. It is unfortunate that the Supreme Court chose to rest its case concerning this 19th century obstetric procedure upon a 20th century history book about 18th century surgery in general, because the

slightest investigation of the 19th century obstetric authorities would have immediately shown that its unqualified factual assertions were not true. In short, *Roe v. Wade*, 410 U.S. 113, 148 n.43, is a spurious citation. See Exhibit 9-12.

3. Based upon these erroneous factual assertions that abortion was hazardous to the life of the woman and that abortion mortality was high, the Supreme Court founded the conclusion that the purpose of these 19th century criminal abortion laws "was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy," *Roe v. Wade*, 410 U.S. at 149, and the abortion laws were not intended to protect the life of the unborn child. Consequently this is an erroneous conclusion based upon factual assertions that are not true. See Exhibit 8-14.

4. Attempting to corroborate that conclusion, the Supreme Court cited some 19th century case authority to hold that the purpose of the abortion statutes was to protect the life of the woman from the hazardous abortion operation and the laws were not intended to protect the life of the unborn child. However examination reveals these citations to be based upon misquotation. The Court, in various ways, selected statements by 19th century courts that a purpose of the criminal abortion statute was to protect the mother from the criminal abortionist, because criminal abortions were very hazardous to the life of the mother, and misread them to mean that the sole purpose of the law was to protect the woman from all abortions, even by doctors in hospitals, because the abortion procedure per se was hazardous to the life of the mother. See Exhibit 14-27.

As an example of this, in *Roe v. Wade*, 410 U.S. 113, 151 & n.47, the Supreme Court cited C. Means as "scholarly" authority for the conclusion that these 19th century abortion laws "were designed solely to protect the woman." Examination of the basis of this conclusion

by Means shows that it is essentially founded upon the misquotation of *State v. Gedicke*, 43 NJL 86, 96 (1881). The court there held that the punishment of a criminal abortion attempt, in which neither the mother nor the child died, was not cruel and unusual within the prohibition of the Constitution: "It is a reasonable punishment for a heinous crime, which in almost every case endangers the life and health of the woman, and the destruction of the foetus or child." Means selected this statement on the hazards of criminal abortions to both mother and child, and by taking the phrase concerning the mother out of context, misquoted it to mean that all abortions, even by physicians in hospitals, "in almost every case endangers the life and health of the woman." See Exhibit 19. Means then cited this misquotation as evidence that the purpose of the abortion laws was to protect the life of the mother and not the life of the unborn child. See Exhibit 17-21. To enhance his case, Means speculated that the abortion operation in the 19th century was roughly as dangerous to the life of the woman as the deadly Caesarean operation, that is, the removal of the child from the womb by surgically opening the abdomen. See Exhibit 20 n.59, 5 n.8. Of course, Means omitted all the 19th century obstetric authority which stated that the abortion operation was not hazardous to the life of the mother. See Exhibit 1-8. And the Supreme Court repeatedly cited Means as authority for its abortion decision. See *Roe v. Wade*, 410 U.S. at 132 n.21, 133 n.22, 135 n.26, 139 n.33, 148 n.42, 151 n.47.

5. The Supreme Court also cited *Abele v. Markle*, 342 F.Supp. 800, as legal authority that "sharply disputed" that "a purpose of these laws, when enacted, was to protect prenatal life." *Roe v. Wade*, 410 U.S. 113, 151 & n.46. Actually that court based this conclusion on the authority of C. Means, *supra*, that the purpose of the abortion laws was to protect the life of the mother from

the hazards of the abortion operation, and the laws were not intended to protect the life of the unborn child. The court did not consult even one single 19th century obstetric text. See Exhibit 15-17. Consequently another authority relied upon by the Supreme Court also rests upon erroneous factual evidence.

6. The Supreme Court also cited *State v. Murphy*, 27 NJL 112, 114 (1858) as authority that these 19th century abortion statutes were interested in "protecting the woman's health rather than in preserving the embryo and fetus." *Roe v. Wade*, 410 U.S. 113, 151 & n.48. And again this citation is based upon misquotation. The *State v. Murphy* case was concerned with the great hazard to the life of the mother from criminal abortions, not the abortion procedure per se. This case was also misquoted by Means. See Exhibit 21-27.

In short, the primary evidence, which the Supreme Court presented in *Roe v. Wade* to prove that the 19th century abortion statutes were enacted to protect the life of the mother and not the life of the child, is based on erroneous factual assertions; and the evidence presented in *Roe v. Wade* to corroborate these factual assertions is founded upon misquotation.

To summarize, the purpose of these 19th century abortion statutes to protect the lives of unborn children appears conclusively established by two independent sources. First, the obstetric medical evidence, that the abortion operation was not considered hazardous to the mother, shows that the motivating purpose could only have been to protect the lives of unborn children. Second, there is the large volume of statements by leading legal authorities, with none to the contrary, that the purpose of these criminal abortion statutes was to protect the lives of unborn children. See Exhibit 3 n.5, 12 n.40.

B. BECAUSE OF THESE FACTUAL ERRORS, *ROE v. WADE* MUST BE OVERRULED

The amici contend that *Roe v. Wade* must be overruled solely because of these factual errors. However, the amici present the following historical context as useful background material.

The word in the Constitution that was construed in *Roe v. Wade* was the word "person." In all American history, only one other time has the word "person" in the Constitution been construed by the Supreme Court to absolutely deny the protection of the Constitution to a group of persons. That was *Scott v. Sanford*, 19 How. 393, which held that black persons had not been included as persons protected by the Constitution. With a far weaker factual basis, relying generally upon the Declaration of Independence and other historical evidence, Abraham Lincoln denounced the Dred Scott decision as "an astonisher in legal history . . . a new wonder of the world" that was "based upon falsehood." 2 *The Collected Works of Abraham Lincoln* 495 (R. Basler ed. 1953). Historically speaking, Americans have ever been skeptical of conclusions that some group is inferior and consequently was excluded from the protection of the Constitution.

In the context of that great reform movement to guarantee all persons the protection of the law for fundamental rights, the American people adopted the Fourteenth Amendment with the unequivocal language that "nor shall any state deprive any person of life . . . without due process of law." The words "any person" are clear, absolute, and on their face allow no exceptions. And no one has yet discovered anything in the legislative history that the amendment was intended to overrule the near universal legal policy of protecting the lives of unborn children by law, or to create any exceptions to the absolute terms "any person." To the contrary, it was stated repeatedly during the legislative debates that no

objection could be made to the clause that no person could be denied due process or equal protection of the law because it embodied the ideal of the Declaration of Independence. And in interpreting the Fourteenth Amendment the Supreme Court held that "it is always safe to read the letter of the Constitution in the Spirit of the Declaration of Independence." *Gulf, Colo. & S. Fe Ry v. Ellis*, 165 U.S. 150, 159-160 (1897).

Concerning the purpose of the Declaration of Independence to include unborn persons, there appears little doubt that Thomas Jefferson considered the unborn child to be a person who had been "created" and equally endowed with an inalienable right to life. Jefferson, quoting Tertullian with approval, wrote: "Tertullian's words are . . . . 'in ipso ultimo voluptatis aestu, quo genitale virus expellitur, nonne aliquid de anima sentimus exire?' The holy father thus asserting, and, as it would seem, from his own feelings, that the sperm infused into the female matrix deposits there the matter and germ of both soul and body, conjunctim, of the new foetus." 15 *The Writings of Thomas Jefferson* 267 (A. Bergh ed. 1907). Concerning the unborn child, Tertullian had written: "to kill a child before it is born is to commit murder by way of advance; and there is no difference whether you destroy a child in its formation or after it is formed and delivered. For we Christians look upon him as a man who is one in embryo . . ." E. Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 Geo LJ 395, 426 (1961).

These sentiments are in agreement with the findings of science, long established by the time the Fourteenth Amendment was adopted, that at conception a new independent being comes into existence and gradually progresses, both before and after birth, from one degree of perfection to another. See Exhibit 3 n.5, 12 n.40. And the universal statutes that made abortion a crime, unless it were necessary to save the life of the mother, demonstrate the legal intent to protect that new existence.

However, the amici contend, the historical context entirely aside, that the factual errors alone mandate that *Roe v. Wade* must be overruled.

The Supreme Court has ever held that the canons of construction by which it is bound must be rooted in truth and reason. See Exhibit 30-32. As Chief Justice Taney wrote more than a century ago, a constitutional decision by the Supreme Court must be "always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of reasoning by which it is supported." *The Passenger Cases*, 7 How. 283, 470.

This standard of reason, and the factual errors, present the singular question to the Supreme Court: How is it possible that virtually all the states that adopted the Fourteenth Amendment, Exhibit 38 n.119, and the United States Congress which proposed it, Exhibit 38 n.120, had, either before the adoption of the amendment or shortly thereafter, adopted criminal abortion statutes to protect the lives of unborn persons, and at the same time, without comment or explanation, created in the Fourteenth Amendment a constitutional right to kill unborn persons for convenience and absolutely withdrew all power from the states to protect the lives of unborn persons?

The amici respectfully submit that these factual errors cause the most vital part of the Constitution, involving the protection of human life, to be founded upon such a preposterous contradiction, which no reasonable person could entertain, that if *Roe v. Wade* is not overruled, then it would be an undisguised admission that the American Republic is surrendering government by laws based upon truth and reason, and adopting government by men based upon arbitrary will and evidence that is not true.

CONCLUSION

The amici desire full oral argument, where all the facts and rebuttal can be heard by this Court, so that the truth can be determined.

If the alleged errors cannot be explained, then there can be no question that the state of Missouri has the power under the Constitution to protect the lives of unborn persons by the abortion law that was in existence prior to *Roe v. Wade*. And indeed, the evidence is now so overwhelming, that the conclusion in *Steinberg v. Brown*, 321 F. Supp. 741, 746-747 (1970) that, "Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it," appears unavoidable unless the Supreme Court now discovers compelling new historical evidence to the contrary.

Respectfully submitted

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D.,
Appellants,

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis,
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

MOTION OF LAWYERS FOR LIFE, INC., AND SOCIAL WORKERS FOR LIFE FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLEES AND BRIEF

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MOTION OF LAWYERS FOR LIFE, INC. and SOCIAL WORKERS FOR LIFE FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLEES

Lawyers for Life, Inc., a Not-for-Profit Corporation, and Social Workers for Life, respectfully move for leave to file a Brief as Amici Curiae in support of Appellees.

Lawyers for Life, Inc. is a Not-for-Profit Corporation, incorporated under the laws of the State of Missouri for the express purpose through its Charter as follows: "To secure through law the natural right to life for all innocent life from conception to natural death. In seeking to accomplish this end, the organization elects to engage in legal actions, public activities, education, research, and dissemination of information and furtherance of the aforesaid objects and lend its assistance to all persons, organizations, or causes which promote or further such end." Its members consist of lawyers engaged in the general practice of law, trial practice, patent law, professors at St. Louis University School of Law, Washington University School of Law, all located principally in the Metropolitan St. Louis area.

Social Workers for Life is an organization of social workers, most of whom are members of the Academy of Certified Social Workers who have the following expressed purposes:

1) To promote social policies and legislation at the local, state, and federal levels that will protect the rights of all persons from the moment of conception until natural death;

2) To foster programs that promote the maximum development of the individual throughout his/her lifetime;

3) To protect human life from legal or illegal discrimination;

4) To provide a form in which some of the complex issues that affect the dignity of persons can be discussed and clarified;

5) To assist social workers to resolve issues in which their personal and professional values are in conflict with agency policy and/or professional groups;

6) To provide a vehicle through which individual social workers may demonstrate their concern through meaningful volunteer and educational programs;

7) To work in cooperation with other pro-life groups to achieve common goals.

Both organizations are vitally interested in the legal, moral, ethical and social problems involving protection of the unborn from the first moment of biological development.

The attorney members of Lawyers for Life have a special interest in the litigation now before this Court because of the serious questions raised by the instant case with respect to the legal status of the family in American society and the legal rights of parents and husbands. As members of American society and American families, as well as members of the legal profession charged with the responsibility of protecting the rights of individuals and society, we are concerned that the challenge presented by this case to the stability of the American family raises questions of profound and disturbing nature. In our brief, we direct ourselves solely to those sections of the Missouri statute in question that pertain to the rights of parents of minor children and husband to participate in deliberations and decisions regarding the termination of life through abortion. Because of the number of sections of the statute in dispute and the complexity of the issues involved, there is the very real possibility that the rights of absent—parents and husbands—may be overlooked. For this reason, we ask leave of this Court to present our views regarding the underlying principles upon which the validity of those portions of the challenged statute pertaining to consent should be determined.

The consent of John C. Danforth, Attorney General of the State of Missouri and Counsel for Appellees, has been obtained

and has been filed with this Court. Frank Susman, Attorney for Appellant, would not consent to this Brief.

Respectfully submitted

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BRIEF AMICI CURIAE OF LAWYERS FOR LIFE, INC. and SOCIAL WORKERS FOR LIFE IN SUPPORT OF APPELLEES

STATEMENT OF THE CASE

On June 17, 1974, Appellant filed in the District Court seeking a declaratory judgment holding the Missouri abortion statute (House Committee Substitute for House Bill 1211, 77th General

Assembly, Second Regular Session) to be unconstitutional and requesting the Court to issue a permanent injunction restraining the defendants from implementing or enforcing the new statute.

Declaratory relief was requested pursuant to 28 U.S.C., Section 2201, and a statutory three-judge panel was convened on June 19, 1974, pursuant to 28 U.S.C., Sections 2281 and 2284.

Appellant's application for a temporary restraining order and a preliminary injunction were denied and trial on the merits took place on July 22 and 23, 1974. The District Court entered an opinion and order upholding all challenged sections of the statute, with the sole exception of Section 6(1) which was held to be unconstitutional and its enforcement accordingly enjoined.

The District Court, in its opinion, held that the challenged provisions of House Bill 1211 (Sections 2(2), 3(2), 3(3), 3(4), 6(1), 7, 9, 10(1), 10(2), 10(3), and 11) "with the exception of Section 6(1), . . . conform to the *Roe* and *Doe* decisions in every material respect." 392 F. Supp. 1362, 1367.

Appellee Danforth filed his "Motion to Alter or Amend Judgment" in regard to Section 6(1) on February 6, 1974, and the same was denied by "Order" of the District Court on February 12, 1975.

Appellants' "Motion for Stay of Application and Enforcement of Statute Pending Appeal to the United States Supreme Court" was granted by this Honorable Court on February 18, 1975 (43 L.W. 3451). Appellants' appeal to this Honorable Court was taken pursuant to 28 U.S.C., Section 1253.

ARGUMENT

I

The State and the Family Interests in Protection of the Health & Welfare of the Family Override a Minor's Free Access to Abortion.

Roe v. Wade specifically declined to consider parental consent as a requirement for a minor seeking an abortion. 410 U.S. 113, 165 n 67 (1973). Therefore, the application to minors of the *Roe* standards of personal privacy and compelling state interests has been conjectural. Upon examination now it is imperative that the relationship between the minor and her parents, the minor and the state, and the family and the state be weighted against the minor's right to an abortion.

Traditionally, the state has sought to protect minors. Often, the state has made it clear that the minor is not equal to an adult. This is true in areas like contracting, operation of a motor vehicle and access to alcoholic beverages. In other situations, the state requires protection of the minor by appointment of a guardian ad litem. It is always the quality of a minor's decision-making which is in issue: the state would protect the minor from his own improvidence and lack of information.

In more personal matters, the state assigns protection of the minor to his parents. At common law parental consent for medical treatment is required as a substitute for the child's. Restatement of Contracts § 18 (Tentative Draft, 1964). Although there are some kinds of treatment which state statutes permit without parental consent, such as treatment for venereal disease, the minor is still rigidly restricted. In *Relf v. Weinberger*, 372 F. Supp. 1196 (D.D.C. 1974), the Court invalidated a federal program provision which gave minors the authority to consent to sterilization. Parental guidance in decisions with lifelong

physical, mental and psychological effects would seem mandatory.

The legal rights of the minor have been delineated both in criminal and civil areas. *Doe v. Planned Parenthood*, 29 Utah 356, 410 P. 2d 75 (1973) *appeal dismissed* and *cert. denied*, 14 U.S. 805 (1973) approved the requirement of parental consent for the use of contraceptives by a minor. *Ginsberg v. New York*, 390 U.S. 629 (1968), upheld a New York statute which prohibited the sale of obscene literature to minors. The courts have consistently protected the minor's right to freedom of expression, *Tinker v. Des Moines*, 393 U.S. 503 (1969), and *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), but in the area of privacy, a definition of the scope of the minor's rights is lacking. One case, *Merriken v. Cressman*, 364 F. Supp. 913, 918-19 (1973), stated that the state's use of questionnaires designed to pinpoint drug users was an invasion of the students' privacy.

The Supreme Court has recognized the importance of the family to society. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Mayer v. Nebraska*, 262 U.S. 390 (1923); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Roe* reiterated the fundamental concept of child rearing and education as a right of the parents. *Roe*, 410 U.S. at 134. As a basic societal unit, the parents have the responsibility for nurturing and guiding the children of the family. Traditionally, the state's interference in child raising has been slight, as in requiring some type of education or requiring certain inoculations. When the state did step in, as in child neglect or juvenile delinquency situations, it was because the parents were unwilling or unable to cope with the child. Justice Clark has written that

> Unless the State has a compelling interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day to day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution.

T. Clark, "Religion, Morality and Abortion: A Constitutional Appraisal", 2 *Loyola U.L. Rev.* (*L.A.*) 1, 8 (1969).

The parents' interest in helping their child to formulate a good decision cannot be doubted. In an abortion decision, matters of physical health, mental well being and future psychological damage must be evaluated by the decision makers. *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973), held that a woman, married or of legal age, would make the abortion decision in consultation with her doctor. Testimony cited in Defendant Danforth's Post-trial Brief, pages 10-11, shows that the decision is not made by the patient and doctor in most clinic situations. No less an advocate of legalized abortion than Bernard N. Nathanson, M.D., one of the founders of the Center for Reproduction and Sexual Health, the self-styled first and largest abortion clinic in the Western world, recently expressed concern about the caliber of counseling given to women contemplating abortions. In his words the typical counseling available is "the narrow partianship of committed young women who have had abortions." 291 *New England Journal of Medicine* 1189, 1190 (1974). Such counseling cannot be unbiased.

* * * * * * *

If the minor is allowed to decide for herself, or with the aid of counselors employed by these abortion clinics, the minor takes major physical and emotional risks without any kind of state or parental protection. By not allowing parents to have some voice in this decision process, the court violates the rights of parents. Their duty to support and raise their child remains, but their authority is unjustifiably narrowed when they have no voice in the decision. Parental rights must be protected if parents are to fulfill their legal obligation to the child.

Many recent dissents have supported an idea first promulgated in *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944), that parental function and freedom in raising their children included "preparation for obligations the state can neither supply nor hinder." *State v. Koome*, 530 P. 2d 260, 271 (Wash. 1975); *Planned Parenthood Assn. v. Fitzpatrick*, No. 74-2440 (Sept. 4, 1975); *Baird v. Bellotti*, 393 F. Supp. 847, 857 (D. Utah, 1975).

The health of the minor is the major consideration of her parents. She may be completely unaware of the physical or emotional problems which could result, whether she decides to have or not to have an abortion. Besides the factual information which the parent can either supply or seek, it is the parents who will be giving emotional and financial support to the minor.

Many eminent social scientists, psychologists, socialogists, psychiatrists and social workers recognize the futility of treating just the individual who is facing a crisis without also involving her family in the treatment process. The family is viewed as a unit of interacting personalities where individual problems are seen as reflecting family problems and wherein the family unit has a vital stake in the member's attempt to cope with a personal crisis. This is particularly the case with minor children since they are even more apt to be psychologically and physically dependent upon the family for security and counsel. S. Minuchin, *Families & Family Therapy* (1974); *Expanding Theory and Practice in Family Therapy* (N. Ackerman ed. 1967); *Family Therapy and Disturbed Families*, (G. Zuk & I. Boszormenyi ed. 1967); V. Satis, *Conjoint Family Therapy* (1967); R. Brown, "Feedback in Family Interviewing," 18 *Social Work* 52-59 (Sept. 1973); D. Olson, "Marital and Family Therapy: Integrative Review and Critique," *Journal of Marriage and the Family*, No. 1970, 501-537; "Psychiatric Aspects of Abortion," 64 *J.N.M.A.* 308 (1972).

The state actually protects itself in preserving the family unit. Marriage and sexual regulations have been a feature of

state law for many years. The effect on the state of permissive abortion has been damaging in the past. For example, in the early 1920s abortion on demand was explicitly permitted in Soviet Russia for minors as well as adults. Widespread abortion and other anti-family policies precipitated a severe breakdown in the parent-child relationship. Delinquency, irresponsibility and human exploitation were rampant. The Soviet government abolished free abortion on June 27, 1936, because the entire structure of Soviet society was so threatened. The importance of the family structure where parents had authority over their minor children once again became the established Soviety policy. N. Timasheff, "The Attempt to Abolish the Family in Russia," *A Modern Introduction to the Family*, 55, (N. Bell & E. Vogel eds. 1960); L. Coser, "Some Aspects of Soviet Family Policy," 56 *American Journal of Sociology* 424 (1951); R. Schlesinger, *Changing Attitudes in Soviet Russia: The Family in the U.S.S.R.* (1949); K. Geiger & A. Inkeles, "The Family in the U.S.S.R.," 16 *Marriage and Family Living* 397 (1954).

It is vital that § 3(4) of Missouri House Bill 1211 be upheld by the Court. By eliminating the prior abortion laws, the Supreme Court made abortion available to all women. If minor women are allowed the same unrestricted access to abortion, the court will be sanctioning a tremendous upheaval in American families. The Missouri legislature has acted to maintain the traditional family relationship, a unit basic to the state's own well-being, by requiring the consent of at least one parent for an abortion to a minor.

Critics of the parental consent provision cite unreasonable manipulation of a minor by parents who would force her to have an abortion that she didn't want, or preventing her from having an abortion that she did want. This focuses on families where the parents are assumed to be unconcerned about the health and safety of their daughters. House Bill 1211 requires the consent of only one parent, and it would seem

reasonable to assume that the legislators were drafting a bill which would protect the welfare of individual girls and family units. To find the section unconstitutional because of possible abuse would be unthinkable. Every law has the potential of supporting an abusive use of the law. The state's interest in preserving the family, and the parents' interest in the health and welfare of their daughters overcome a minor's free access to abortion.

II

The Husband Has an Interest in the Unborn Child Which His Spouse Is Carrying.

It cannot be denied that a husband has an interest in the unborn child which his spouse is carrying. This position was recognized by the Supreme Court when it declared that "Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535 at 541 (1942). It is well established that parenthood or the desire to be a parent is of fundamental importance to the marriage partners. L. Jessner, E. Weigert & J. Foy, "The Development of Parental Attitudes During Pregnancy," in *Parenthood: Its Psychology and Psychopathology* (hereafter, *Parenthood*), 20 9-244 (E. Anthony & T. Benedek eds. 1970).

Authority for the position that husbands have an equal interest in their unborn child which they share with their wives is found in *Touriel v. Benveniste*, Docket No. 776790 (Col. Sup. Ct., Oct. 20, 1961), an unpublished opinion cited in Note, "Abortion: The Father's Rights," 42 U. Cin. L. Rev. 441, 445 (1973). The Court held that a husband could sue and collect damages from a doctor who aborted the unborn child his wife was carrying where the doctor did not have the husband's consent. There are also many wrongful death cases in which both fathers and mothers are alleged to recover for

the wrongful death of their unborn child. See 18, *The Ass'n of Trial Lawyers of America Newsletter* 6 at 284 (August, 1975). In the recent case of *Coe v. Gernstein*, 376 F. Supp. 695, 698 (S.D. Fla. 1973), the Court declared that: "The interest which a husband has in seeing his procreation carried full term is perhaps, at least equal to that of the mother. It may be that the husband's interest in this mutual procreation attaches at the moment of conception."

A woman does not have an absolute right to bodily privacy. The Courts have consistently recognized that personal bodily privacy is not inviolable. In *Buck v. Bell*, 274 U.S. 200 (1927), the Supreme Court determined that a state had the power to sterilize a mentally defective person. Compulsory vaccination laws were upheld by the Court in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). The power of a state to take a blood sample from an unconsenting alleged drunk driver was sustained in *Schmerber v. California*, 384 U.S. 757 (1966). In *Raleigh Fitken-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A. 2d 537 (1964), *cert. denied* 377 U.S. 985 (1964), the Court ordered blood transfusion to be given to an unconsenting woman to save the life of the woman and or her unborn child. More recently the Supreme Court in *Roe*, 410 at 154, noted that the privacy right involved in a woman's decision to abort her unborn child "cannot be said to be absolute."

When one is a member of society he does not have an absolute right to do what he wants. The interests of others must necessarily be considered. "When one becomes a member of society he necessarily parts with some privileges . . . one who is prevented from injuring another cannot justly assert that he himself has been deprived of any right." 16 Am. Jur. 2d, Constitutional Law, § 60, 687. Also see G. Lipson & D. Wolman, "Polling Americans on Birth Control and Population," 4 *Family Planning, Perspectives* 39 (1972).

Since it is established that the husband has an interest in his unborn child and that a woman does not have an absolute right to bodily privacy, it follows that the husband shares a right of privacy in the abortion decision with his wife. There are marital, as well as purely personal privacy rights, that are involved here. The Court recognized the existence of marital privacy, the privacy of the marital relationship, in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Mr. Justice Douglas, speaking for the majority, did not refer to individual separate rights of the husband and wife. Instead, he spoke in terms of marital privacy. "A relationship lying within the zone of privacy created by several fundamental constitutional guarantees," *Griswold*, supra at 485.

Since both parents have personal privacy rights as well as shared marital privacy rights, the due process and equal protection clauses appear to compel the weighing of these rights in the abortion decision. It would be an unjust balancing if the privacy interests of the wife were deemed to outweigh the husband's interest in the unborn child and the interests of the marital relationship. In *Reed v. Reed*, 404 U.S. 71 (1971), the Supreme Court held that a state probate code which gives preference to men over women in the appointment of administrators is unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment. In a more recent case, *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the Court held that a mandatory maternity leave of five months for pregnant teachers violates the due process clause of the Fourteenth Amendment. *Reed* and *LaFleur* demonstrate that there cannot be discrimination solely based on sex. This would appear to be the result if the husband is precluded from participating in the abortion decision with his wife.

There is a strong similarity in a father's deprivation of his offspring by abortion and a father's deprivation of custody of his children by adoption. In *Stanley v. Illinois*, 405 U.S. 645

(1972), the Supreme Court held that there is a violation of the Due Process Clause of the Fourteenth Amendment when a putative father is deprived of custody of his illegitimate children without a hearing to determine his lack of fitness as a father. In an earlier case, *Armstrong v. Mango*, 380 U.S. 545 (1965), the Court declared that a legitimate parent had to be given notice of a pending adoption of his child by his former spouse's new mate. Therefore, *Stanley* and *Armstrong* indicate that an expectant father is at least entitled to a hearing at which his interests in seeing the pregnancy carried to full term can be weighed against those of the spouse who desires an abortion. The mandatory spousal consent provision of the Missouri law should be upheld for it guarantees that there will be notice to one spouse of the other spouse's desire for an abortion. If there is a disagreement, then the spouses can seek judicial relief. At the judicial proceeding, both parties should be given an opportunity to demonstrate their interest in the outcome of the decision. This decision would not be an impossible one for the Court. Standards for the decision making have been suggested in "The Father's Right in the Abortion Decision," *6 Texas Tech. L. Rev.* 1075, 1093 (1975). It should be noted that the consent of both spouses is required by statute for many major family decisions. One example is the spousal consent requirement concerning the legitimization of children conceived by artificial insemination. See Georgia Code § 74-101.1; Kansas Statutes § 23-128; North Carolina Gen. Stats. § 49A-1.

It is essential to realize that the father has a major role and interest in the birth of his child. Fatherhood provides an opportunity for the man to expand his horizons and develop his human potentials, including generative and generosity. E. Erikson, "Identity and the Life Cycle: Selected Papers," 1 *Psychological Issues* 1 (1959). The psychological importance of fatherhood was evidenced by the many letters written by soldiers during WW II which revealed fantasizing about their children, and that such fantasies helped them to overcome hardships and

deprivations. It actually increased their resourcefulness in actual danger. T. Benedek, "Fatherhood and Providing" in *Parenthood* at 167.

Today, fathers express increasing interest in the progression of their wife's pregnancy. Many feel increasing anticipation and anxiety as the date of birth approaches. See, generally, Spock, *Baby and Child Care*, 28-31 (1969); L. Jessner, E. Weigert & J. Loy, "The Development of Parental Attitudes During Pregnancy," in *Parenthood* at 209. Married couples are increasingly participating in the Lamaze method of prepared childbirth. According to this and other similar programs, the couple works as a team in preparing the wife for childbirth. The husband assists the wife with breathing exercises and emotional support during pregnancy and during childbirth itself. The major emphasis now is on the father as a complementary partner and co-partner throughout the entire parenting process. O. English and C. Foster, *Fathers Are Parents, Too* (1951) and G. Schaefer, "The Expectant Father: His Care and Management," 38 *Postgraduate Medicine* 658 (1965). Therefore, the husband's interest in the birth of his child would be completely terminated if his spouse would have an abortion without his consent. Surely such an action by the wife would also severely damage the integrity of the marriage relationship. Where the state allows the woman to seek an abortion without her husband's consent, it prefers the wife's right of bodily privacy over the privacy of the marital relationship and the husband's right of bodily privacy. See *Reed, Cleveland Board of Education, Stanley*, and *Armstrong*.

Survival of the family in society today is based in great part on the mutuality of decision making by the partners of a marital relationship. A state, by eliminating the requirement of spousal consent in the abortion decision process, would be interfering with the stability of the family unit.

Assuming *arguendo*, that a woman carries her unwanted pregnancy to term, there is firm authority to support the position that she may grow to love the child. An unwanted pregnancy and resulting birth does not mean that the woman will beat or batter her child. B. Steele, "Parental Abuse of Infants and Small Children," in *Parenthood* at 449. R. Helfer and C. Kemper, *The Battered Child* (1968).

Even if she bears the child and does not eventually love her child, it cannot be denied that the father could provide proper care for the child. In situations where there are divorces and the father retains child custody, it is not unusual for the father to adequately raise the child in a healthy emotional environment. Widowers can and do raise emotionally healthy children. Therefore, the wife's interest alone should not be absolute in any determination of the abortion decision.

As such, it is logical to assume that a competent party, i.e., the father, should be allowed to guard the interest of the unborn child through the final stages of pregnancy and throughout the infant's childhood. It should also be noted that the state also has an interest in protecting the unborn. See, generally, *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A. 2d 537 (N.J. 1964), *cert. denied* 377 U.S. 985 (1964). Even in *Roe*, at 163, the Supreme Court noted that the state has an interest in protecting pre-natal life, although it limited this interest until the unborn child has reached viability. Thus, the father's interest in his unborn child and the state's interest in the protection of the unborn clearly outweigh the interest of the wife who wants to abort her pregnancy without the consent of her spouse.

CONCLUSION

To sustain the appellants' position in this case would isolate the 18 year old and under unmarried girl from her family at the very moment she is to make a crucial decision re-

garding her unborn child. Appellants would insist this girl consult an abortion clinic (wherein the livelihood of the abortionist, or the counselor, or the other supporting personnel may well depend upon abortions) to help her make that decision. The comfort of her parents or of a trusted person in *loco parentis* would be yanked away from her at a time she so desperately needs the help such a confidant could give. Appellants would place her in a social vacuum to be aided only by the abortionist who not only has a financial stake in the outcome, but is ideologically predisposed to advising her of a course to abort.

Section 3(3) of House Bill 1211 would be declared unconstitutional by the appellants and throw the woman's spouse completely out of the household. He can be required to support the child, to educate his child, he must expressly disinherit his child, but he has no rights to the very existence of his child. The appellants insist the wife has an absolute right to destroy her unborn child and the husband has no rights. All the mother is willing to give her spouse is the duties, and none of the rights. It is clear from the documents submitted by the Social Workers for Life that this burden is one which may well destroy the well being of the father, as well as the family relationship.

Therefore, we feel that both the parental consent and spousal consent is absolutely essential to the well being of the society in which we have placed the family relationship.

Respectfully submitted

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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1975

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D.,
Appellants,

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDON RYAN, Circuit Attorney of the City of St. Louis, Missouri,
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

MOTION OF MISSOURI NURSES FOR LIFE FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLEES WITH BRIEF ANNEXED

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On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

MOTION OF MISSOURI NURSES FOR LIFE FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLEES

Missouri Nurses for Life is a non-sectarian inter-disciplinary state wide organization of licensed professional nurses dedicated to promoting the quality and dignity of all human life. Missouri Nurses for Life affirms the responsibility of all health care personnel to support and sustain life. And are resolved to assist those doctors, nurses and health care workers who are being discriminated against or denied the opportunity to practice their

profession according to the dictates of their conscience because of their belief in the inalienable right to life and their respect for all human life.

Each of its 300 members is a Professional Nurse, licensed to practice nursing in the State of Missouri. Its members are employed in both public and private hospitals, and are both private duty and general duty nurses practicing different nursing specialties at both the administrative and staff levels.

Nurses are an integral part of the overall health service operation. The nurse-patient relationship is unique and frequently involves a more prolonged and closer personal association than the patient may have with her doctor.

Missouri Nurses for Life are concerned that the particular viewpoint of nurses with respect to the propriety of the legislation now under scrutiny in this case will not be heard or considered. Amicus feels that the development of the nurses' position with regard to House Bill 1211 is essential to and will assist the Court in a proper determination of the issues raised on this appeal. For these reasons, Missouri Nurses for Life ask leave of this Court to file an Amicus Curiae Brief in support of the Appellees.

The consent of Appellee has been obtained and has been filed with this Court. The consent of Appellant has been requested and such consent was not granted.

Respectfully submitted

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IN THE

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BRIEF AMICUS CURIAE OF MISSOURI NURSES FOR LIFE IN SUPPORT OF APPELLEES

STATEMENT OF INTEREST

Nursing is basically a caring profession, whose ethical code, in its various versions, has always been supportive of human life and the dignity of man. While the nurse frequently carries out the physician's orders and cooperates in his activities, "neither physicians nor the employing agencies' policies relieve the nurse

of the responsibility for her own nursing actions or judgments." (See *Code for Nurses* [most recent revision—1968], *American Journal of Nursing*, 68:12:2581-2585, December, 1968.) An earlier version of this Code states even more specifically "The fundamental responsibility of the nurse is to *conserve life*, to alleviate suffering, and to promote health." (1960 revision.) Article 4 of the current Code states, "The nurse acts to safeguard the patient when his care and safety are affected by incompetent, unethical or illegal conduct of any person," and the detailed explanation of this principle stresses the fact that "whenever a practice threatens the patient's health, welfare or safety, the nurse has *no choice* but to take appropriate action in his behalf." That nurses have ambivalent feelings about the question of abortion is apparent from a survey that recently appeared in *Nursing '75* (Part 2, of a survey on Death and Dying in which 15,000 plus nurses answered a questionnaire on their opinions, attitudes and practices concerning abortion.) These feelings are also reported in an article "Abortions Unwilling Accomplices," *Human Behavior*, April 1975, p. 42. In the Amicus' opinion, however, the threatened patient in the case of abortion is our "littlest patient," the unborn child, and we must speak out in his defense. In addition, the health and safety of the mother are also at stake.

Mary Cipriano Silva in "Science, Ethics and Nursing" (in the *American Journal of Nursing*, 74:11:2004-2007, November 1974), outlines a number of ethical problems nurses are now facing and will be facing in the near future such as abortion, euthanasia, genetic cloning, "test tube babies" research, and other "future shock" procedures. She also emphasizes the necessity for each nurse to develop her own personal code of ethics which will enable her to cope with these problems.

In all of the controversy, emotional outpouring and acrimony of both pro- and anti-abortionists, the nurse sees her profession

threatened and "caught in the middle" in many ways. Just the definition of abortion alone, as stated in House Bill 1211, has tremendous implications for nursing:

> Section 2 (1). "Abortion" is the *intentional destruction of the life of an embryo or fetus* in his mother's womb or the intentional termination of the pregancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child.

Most nurses, and especially maternal and child health nurses, have always realized (and have been taught) that in caring for a pregnant woman one is caring for *two* patients, the woman whom she could see and the unborn child within her whom she could not see, but who could be identified by such things as listening to his heart beat with a stethescope, recording his electrocardiogram or electroencephalogram, or outlining his figure by X-ray or ultrasound! This belief is reiterated in the standards of the Maternal and Child Health Section of the American Nurses Association.

> *Standard II.* Maternal and child nursing practice is based upon knowledge of the biophysical and psychosocial development of individuals *from conception* through the child bearing phase of development and upon knowledge of the basic needs for optimum development. (See "Standards of Maternal and Child Health Nursing Practice," which appears as an appendix to *Maternity Nursing Today*, a textbook published by McGraw-Hill Book Co., 1973.)

With such high standards of care, is it any wonder that the survey made by *Nursing '75* found that 67% of maternal and child health nurses did not approve of discretionary abortions? (Also see Dr. Albert W. Liley's testimony given on May 4, 1974 to

the U.S. Senate's Judiciary Committee's Sub-Committee on Constitutional Amendments—Appendix D—"The Unborn Child as Patient" *Human Life Review* 1:1:108-109, Winter 1975.)

The nurse's biological and physiological background has taught her that human life begins at conception with the *genetic* formation of a new human being. This conceptus is not just a "blob" of protoplasm or undifferentiated cells, but is provided with a complete set of instructions for his or her future development the moment the sperm fuses with the nucleus of the ovum and the DNA of the new set of chromosomes begins to function. This *in vivo* process of fertilization and development of the fertilized ovum into a recognizable human fetus has even been filmed by Dr. Molyuki Hayashi, head of the Department of Gynecology and Obstetrics at Tokyo's Toho University School of Medicine. He is anxious to show this firm to medical students and other students, because "Having seen this film, youngsters will at least know to be awed by the value of life." ("The Beginning of Life," *Time*, June 24, 1974:78-80, with its accompanying photographs.) Two other references worth reviewing are (1) the statements of Dr. Jerome LeJeune, Professor of Fundamental Genetics at the Univerité Rene Descartes in Paris, in "Human Genetics and the Unborn Child" which was included as Appendix C in the first volume of the *Human Life Review*, Winter Number, 1975:1105-1107 and (2) "Sounding Board: Deeper Into Abortion" *New England Journal of Medicine*, 291:22:-1189-90, November 28, 1974.

Few nurses would refuse to give any care to the abortion patient because of their concern for the safety of the mother. In any cooperation with the abortion *procedure*, however the nurse is faced with the fact that human life is being destroyed and that she must accept this fact in making her own decision as to whether or not to become directly involved in the delivery room or operating room of a hospital or special abortion facility. If her ethical, moral, professional, and religious principles convince her that she should have no part in such activities, her con-

science must be respected and no one should be able to compel her to *take* part in such activities. This is *her* constitutional right.

In Missouri, this right to refuse is protected not only by 42 USC 300 a-7, but by Sec. 197.032, Missouri Revised Statutes, and so that right is not considered in detail here, except to state that some nurses who currently work in institutions (hospitals) which perform abortions have commented on the fact that their positions seem to be in jeopardy because of their ethical convictions, even though these are currently protected by law. Harassment can take many forms short of actually "breaking the law" and the Courts should be aware of the practice.

Although amicus feels that the purposeful destruction of our smallest and most vulnerable patients is not an acceptable procedure for those who practice one of the healing professions and that nowhere in the Constitution is a physician or other health care professional given the right to destroy the life of a patient, that matter is not before the Court in this case. But because we have an interest in the future health of women, children and families—especially in the State of Missouri—and because many of these health needs are protected by House Bill No. 1211, we have decided to file this brief in support of appellees.

STATEMENT OF THE CASE

On June 14, 1974 House Bill 1211, which had been passed by the Missouri State Legislature, was signed into law by the governor. This statute defines viability as "that state of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life supportive systems" (Section 2(2)) and prohibits the performance of an abortion in the first trimester of pregnancy without the informed written consent of the woman (Section 3(2)).

It further requires the written consent of the woman's spouse (Section 3(3)) and in the case of an unmarried woman under

the age of 18, the written consent of one parent unless a licensed physician certifies that the abortion is necessary to save the life of a mother (Section 3(4)).

• • • • • • • •

Section 9 of the statute prohibits the use of a saline method of abortion after the first trimester of pregnancy and Section 7 provides that any live infant born as a result of an attempted abortion which was not performed to save the life of the mother, shall automatically become a ward of the state. In addition, House Bill 1211 requires the completion and filing of certain forms containing relevant information regarding each abortion performed (Section 10 and 11), while Section (6(1)) provides that any person performing an abortion who fails to exercise the proper professional skill and care to preserve the life and health of a fetus born alive as a result of such abortion, shall be deemed guilty of manslaughter.

The plaintiffs in this litigation are Planned Parenthood of Central Missouri, which maintains a facility for the performance of abortions in Columbia, Missouri, David Hall, a medical doctor who supervises the abortions performed at the Planned Parenthood facility and Michael Freiman, licensed physician who performs abortions at Barnes and Jewish Hospitals in St. Louis and at Reproductive Health Services, an abortion clinic in St. Louis.

The Complaint alleges that certain provisions of House Bill 1211 are unconstitutional and seeks to enjoin the enforcement of several provisions thereof.

After a trial on the merits, a three judge court held all of the provisions of House Bill 1211 to be valid, except Section 6(1) which was found to be unconstitutionally overbroad. A dissenting judge would have held Sections 3(3), 3(4), 7 and 9 to be unconstitutional but concurred with the majority in upholding the validity of Sections 2 (2), 3(2) and 10. The opinion of the three judge court is reported at 392 F.Supp. 1363.

ARGUMENT

I

The Provisions of House Bill 1211 Requiring the Informed Written Consent of the Patient and/or Spousal or Parental Consent Where Appropriate, Are Consistent With Good Nursing Practices and the Judgment of the District Court Upholding These Provisions Should Be Affirmed.

Nurses frequently are left with the problem of attempting to deal with the psychological and emotional trauma which may result when the required consent procedures have not been observed.

Interestingly enough the following quote appears in one of the current textbooks in nursing (Clausen, et al, **Maternity Nursing Today,** MacMillan Co., 1973, p. 117) written in support of the "poor" father. It would seem to apply equally well when the abortion decision is being considered.

> "As females have suffered so long from sexism, so have males. An aspect of this is the neglect of the husband as an important factor in the pregnancy situation after conception takes place. Generally speaking, he is still ignored as a significant part of the human matrix involved in pregnancy. This carries over into the common tendency to ignore him as a significant parent, except for his financial contribution and 'male role image' in parenthood. All members of the family suffer from this."

So, too, do the members of the family suffer if he is ignored in the abortion decision. After all, he does have a 50% stake in the baby since one-half of its genes were in his sperm and even its sex is determined by whether he donates an X or Y sex chromosome!

In addition, the grieving process the aborted patient goes through is entirely overlooked by the appellants (since they do not care for the patient in the weeks following an abortion), as well as the support she needs from family and friends at this critical time. The husband can be a very positive support in assisting her through this most difficult period if he has had a part in her decision. If it has been made without his consent or knowledge, difficulties are compounded a hundred-fold! Supportive parents can play the same role for the adolescent, if given the opportunity.

The following articles from the *American Journal of Nursing* give information about the grieving process experienced by the majority of women who have had still births or early termination of a pregnancy:

1. Yates, Susan A., "Stillbirth—What a Staff Can Do," *A.J.N.*, 72:9:1592-1594, September, 1972.
2. Johnson, Joan Marie, "Stillbirth—A Personal Experience," *A.J.N.*, 72:9:1595-1596, September, 1972.
3. Seitz, Pauline M. and Louise H. Warrick, "Perinatal Death—the Grieving Mother," *A.J.N.* 74:11:2028-2033, November, 1974.

That the mother who has had an abortion—even a therepeutic one—goes through the same grieving process is well supported by Donovan, et al., "Post Abortion Psychiatric Illness," *Nursing Digest*: September/October, 1975:12-16. The nursing implications are covered on p. 17. Other studies have pin-pointed the same problems.

Another article by Curtis, Frances L.S., "Observations of Unwed Pregnant Adolescents," *A.J.N.* 74:1:100-102, January, 1974 gives some insight into the social problems involved in the care of these youngsters.

The Supreme Court in *Roe* and *Doe* enumerated many factors which must be weighed by a woman who is considering an abortion, and concluded that ". . . All these factors the woman and her *responsible* physician necessarily will consider in consultation."

The District Court stated: "Given the fact that even with counseling the decision to terminate a pregnancy is often a stressful one, *it is imperative that a woman be well advised of the options available and* the physical and psychological ramifications of choosing a particular course of action."

The District Court went on to say: "It is clear from this Court's opinion that, although the abortion decision is to be made in connection with a responsible physician, *the ultimate decision is not the physician's to make*. The consent requirement of Section 3(2) assures that the pregnant *woman retains control* over the discretions of her consulting physician." (Emphasis ours.)

This would seem to be a most important provision to protect the pregnant woman from exploitation. Abortion may seem to be a very attractive "way out" of a difficult situation if one does not fully understand its implications. Many women have opted *against* abortion when they have thoroughly understood that abortion takes the life of a child, no matter at what stage of its prenatal development. This seems to be one of the aspects of abortion *least* understood by the pregnant woman, especially if she is a member of a minority group, poorly educated, and if abortion has been encouraged by those interested in population control (regardless of the method) or perhaps by an interest in their own pocketbooks. One clinic patient commented that she had almost decided to have an abortion until she saw a poster that made her realize that the unborn baby at her particular stage of pregnancy could experience pain and other sensations and might be able to cry. She concluded: "I could never live

with myself if I did that to a *baby*!" (Personal communication of a clinic nurse.)

While Section 3(2) may imply counseling by a physician to assure informed consent, it does not rule out counseling by other professional health care personnel. It has been the experience of nurses that frequently the counseling given by physicians is inadequate because of the time element involved. The busy physician simply does not have enough time to spend with the potential abortion patient to be sure she understands all of the open options—especially since she is always very emotionally involved and may not take in all of his statements the first time they are presented. In addition, most physicians have the previously acquired habit of leaving the actual *care* of the patient (*psychological* and *emotional* as well as physical) to the nurse!

Nursing duties and responsibilities toward the pregnant woman have always included counseling and health teaching as well as physical care. In fact, a pregnant woman might seek guidance from a nurse friend, a nurse practitioner, or a nurse in a health agency even *before* approaching her doctor. A nurse, therefore, should be knowledgeable concerning all the options open to the woman who seeks her counsel, especially resources which are available in her own city. We believe that the nurse should be able to discuss all possible alternatives with a patient, including the option of *not* to have an abortion. If the woman has not seen her physician she should be advised to do so at once. Referral can also be made to any of the available facilities which have been set up to assist the potential mother to meet her responsibilities in the matter. The possibility of giving up the baby for adoption should also be discussed. (See: "Because I loved you, Jennifer," *A.J.N.* 74:3:471, March, 1974. Also see "Birthright: Alternative to Abortion," *A.J.N.* 75:1:76-77, January, 1975.)

Two other articles illustrate the problems of the unmarried nurses who did opt for abortion, but were torn by many

conflicting emotions. If they had had further counseling and supportive care (even though professional nurses themselves) their experiences might have been different. (See "Personal Experiences at a Legal Abortion Center," *A.J.N.* 72:1:110-112, January, 1972, and "Does Anybody Care?" *A.J.N.*, 73:9:1562-1565, September 1973, which illustrates the patient's desperate need for supportive care.)

II

Section 6(1) Should Have Been Held to Be Constitutional Since It Is an Accurate Statement of the Professional Responsibility of Any Doctor or Nurse Attending a Patient Who Gives Birth to a Live Child.

Any discussion of Sec. 6(1) requires a consideration of Sec. 2(2) which defines *viability* as:

> "that stage of foetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life support systems."

This definition has been challenged "because it fails to distinguish between trimesters of pregnancy and because it would have the result, when read in conjunction with Section 5:

> 'No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.'

of forbidding non-therapeutic abortions at an earlier point than is constitutionally permissible *under Roe and Doe*."

We concur with the opinion of the District Court declaring that Section 2(2) is essentially the same as the definition set forth in *Roe and Doe* and that it is even more restrictive be-

cause of the insertion of the word "indefinitely." (Also see definition of viability from Rules and Regulations, *Federal Register* 40:154, Friday, August 8, 1975.) We should like to add that the term "viability" is, from a medical standpoint, fast becoming an archaic term, because of the rapid scientific advances that are being made today. "Viability" as defined in House Bill No. 1211, however, would seem to make the necessary provision for all eventualities.

Section 6(1) was declared overbroad for failure to exclude the stages of pregnancy prior to viability, and was therefore declared unconstitutional.

This Section requires attending medical personnel to take positive action only subsequent to an abortion in the event the fetus is aborted alive. The Court, however, declared it to be unconstitutional.

The standard of "viability" should not be required for this section. Aborted foetuses under the age of viability have been known to be kept alive for as long as possible in order to carry out experimentation. This is *not an accepted standard* of medical or nursing care for the living fetus, even though it is certain that he will eventually die. Surely he is entitled to as much care as that received by any premature infant. It must be remembered that the fetus is capable of feeling pain at a very early gestational age. Electrocardiographic tracings can be made at the age of four weeks, electroencephalographic tracings at six weeks. At eight weeks he will grasp a forceps placed in his hand, and a 12 week fetus definitely responds to pain and noxious stimuli if he should happen to be born alive. Is it the purpose of the Court to deliberately hasten his death or to see him suffer? It is this eventuality that Section 6(1) might also be interpreted to cover and is a logical extension of 6(3) which forbids such research and which up to this point has not been challenged by the plaintiffs as unconstitutional.

It is impossible for anyone to set a specific time at which an infant becomes viable for each case may be different. While the Supreme Court stated that "viability is *usually* reached at 24-28 weeks," it should not desire to be locked in to medieval medicine by making a firm pronouncement that sets a definite time limit. Several cases have been reported in which the life of an infant born at 20 weeks gestation has been successfully maintained. (See Dr. and Mrs. J. C. Wilke, *Handbook on Abortion*, Hiltz Publishing Co., Cincinnati, Ohio, p. 21.)

With the increasing expertise of the obstetrician, pediatrician and nursing specialist and the increasing sophistication of life support systems, the threshold of viability may be pushed back even farther in the future. The plaintiffs apparently were well aware of the fact, or they would not have attempted to protect themselves by requesting "the 24th week" as a definition of viability. Even at the present time, viability is determined more by the weight of the fetus than by its age. (See "Report to the National Committee for Protection of Human Subjects," March, 1975, by Richard E. Behrman.)

Because the infant at the threshold of "viability" is a very fragile being and a high risk patient, the proper life support systems and personnel should be on hand at the time of the surgery (especially if a hystereotomy is performed) to give him the best chance of survival. If the infant is alive, the mother has already abandoned all claim to him according to Section 7, and he automatically becomes a ward of the State. Therefore, any procedure done to deprive him of his life or to hasten his death would be homicide.

The determination of "viability" in any particular case is the physician's responsibility and he should take it seriously. Any child born alive also automatically becomes a *nursing* responsibility, since the nursing care the infant receives immediately in the delivery room becomes important in the preservation of his life.

III

Medical Evidence Supports the Finding of the District Court That the Saline Method of Abortion Is Detrimental to the Woman's Health and Its Use Should Be Prohibited After the First Trimester of Pregnancy.

Appellants contend that Sec. 9 is invalid for the reason that it invades the province of the physician by restricting his exercise of medical judgment in performing abortions. But their real reason is the fact that saline abortions are not the procedures of choice during the first 12 weeks of pregnancy, and are rarely used before the 16th week!

The judgment of the physician is only unfettered during the first 12 weeks of pregnancy. State regulation of the abortion procedure is not invalid after the first trimester unless the reason is not reasonably related to maternal health. The record of the trial shows that the use of the saline method exposes a woman to the danger of severe complications regardless of the skill of the physicians or the precautions taken.

Safer alternative procedures are available such as prostaglandins, mechanical means of inducing labor, etc.

The Court quite properly concluded that: "The proscription against use of saline amniocentesis is reasonably related to maternal health and is, therefore, within the power of the legislature."

One statement by the dissenting judge regarding the saline method struck us as being particularly illogical. The Judge said: "I cannot agree that such regulation is *reasonably related to maternal health;* on the contrary, this seems to be the kind of unwarranted intrusion in medical discretion which the Supreme Court has held infringes upon the patient's constitutional rights." If this judge had ever seen a patient suffering from one of the complications mentioned in the medical evidence we are sure that he would hold that the patient had definite constitutional rights against being exposed to such a

procedure. As a rule she does not realize what she is being subjected to. It is a convenience for the *doctor* to use such a procedure, since he can usually leave the rest of the care of the patient to the nurse and make himself unavailable when the infant is actually expelled. Perhaps this quotation from an article previously mentioned ("Abortions Unwilling Accomplices," *Human Behavior*, April, 1975, p. 19), will give some idea of some of the problems:

> . . . The nurses felt that, after performing abortions, doctors were leaving them with the "dirty work." The cleaning-up process was particularly unsavory after saline-induced abortions performed when the patient is 14 to 20 weeks into the pregnancy. Resident would inject the amnionic sac with saline, then leave the scene. Generally, according to the nurses, the doctors would then make themselves unavailable when, six to 24 hours later, the patient passed the fetus. At times, the aborted fetus had a heart beat and even though it could not survive outside the uterus, the nurses felt torn between giving it oxygen and "assisting in its termination."

If doctors refuse "to be available" when actual expulsion of the fetus takes place, haw can they guard against some of the possible complications which may occur? Skillful as the nurse may be, she is not a doctor and cannot assume full responsibility for the patient's well being. This is an infringement upon *her* constitutional rights!

The best additional recent supporting data which we have found for banning saline amniocentesis is contained in the article "An Evaluation of Abortion Techniques and Protocols," by Drs. Burnett, King, Burkman and Atienza of Johns Hopkins University (*Hospital Practice*, August, 1975:97-105) in which all abortion procedures in use at the present time are outlined and evaluated. The article stresses the fact that *none* of the techniques now in use are perfect and that safer and more efficient methods are urgently required, especially for use during the

second trimester. The article supports the fact that no abortion procedure is really "simple."

The Court concurred that the record keeping required in Sections 10 and 11 was constitutional and justifiable in the light of record-keeping practices. These reports can be considered as restrictive only if the physician or abortion center have something to hide and the request for elimination of these records leaves the motives of the plaintiffs highly suspect. As nurses we are interested in obtaining all pertinent data relating to maternal mortality and morbidity in order to determine nursing needs and to raise standards of nursing care.

CONCLUSIONS

Amicus realizes that much more supporting evidence is available. The selections included herein, however, seem to be sufficiently pertinent to make the point we wish to make—namely, that because of its protective effect on the life and health of the mother who is considering or who has opted for an abortion —Missouri House Bill No. 1211 should be declared constitutional. It is especially important that Sections 3, 6(1), and 9 be retained. Section 3(2) by requiring the written informed consent of the mother protects her from exploitation from those who might seek financial or other gain at her expense, Section 6(1) protects a *living* premature infant from deliberate destruction and Section 9 bans one of the most objectionable and dangerous abortion procedures (saline amniocentesis) after the 12th week of pregnancy.

Respectfully submitted

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No. 74-1151 AND 74-1419

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, A Missouri Corporation, **DAVID HALL, M.D.,** and **MICHAEL FREIMAN, M.D.,** *Appellants,*

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, and **J. BRENDAN RYAN,** Circuit Attorney of the City of St. Louis, Missouri, *Appellees.*

No. 74-1419

JOHN C. DANFORTH, Attorney General of the State of Missouri, *Appellant,*

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, A Missouri Corporation, **DAVID HALL, M.D., MICHAEL FREIMAN, M.D.,** and **J. BRENDAN RYAN,** Circuit Attorney of the City of St. Louis, Missouri, *Appellees.*

On Appeals from the United States District Court for the Eastern District of Missouri, Eastern Division.

MOTION AND BRIEF, AMICUS CURIAE OF DR. EUGENE DIAMOND AND AMERICANS UNITED FOR LIFE, INC., IN SUPPORT OF APPELLEES IN 74-1151 AND APPELLANTS IN 74-1419

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1151 AND 74-1419

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, A Missouri Corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D., *Appellants,*

VS.

JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, *Appellees.*

No. 74-1419

JOHN C. DANFORTH, Attorney General of the State of Missouri, *Appellant,*

VS.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, A Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, *Appellees.*

On Appeals from the United States District Court for the Eastern District of Missouri, Eastern Division.

MOTION OF DR. EUGENE DIAMOND AND AMERICANS UNITED FOR LIFE, INC. FOR LEAVE TO FILE BRIEF, AMICUS CURIAE, IN SUPPORT OF APPELLEES IN 74-1151 AND APPELLANTS IN 74-1419

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

PURPOSE OF THIS MOTION

John C. Danforth, the Attorney General of Missouri has given consent for the filing of this amicus brief.[1] The attorneys for Planned Parenthood of Central Missouri, David Hall, M.D., and Michael Freiman, M.D. do not object to the filing of this amicus brief.[2]

INTEREST OF THE AMICI

1. Identification of the Amici. Dr. Eugene Diamond, M.D. is an intervening defendant in the litigation pending in the Seventh Circuit involving the constitutionality of the 1975 Abortion Act of the State of Illinois.[3] The Three Judge Federal Court which is hearing those consolidated cases on December 2, 1975 appointed Dr. Diamond guardian ad litem for unborn children and other classes affected by the statute.[4]

Americans United for Life (AUL) is a national educational foundation organized to educate and promote better understanding of the humanity of the unborn and the

[1] Written consent has been filed with the Clerk of this Court.

[2] Response of these parties so stating has been filed with the Clerk of this Court.

[3] *Wynn, et al.* v. *Scott, et al.* (N.D. Ill. No. 75 C 3975) and *Long, et al.* v. *Scott, et al.* (N.D. Ill. No. 75 C 3981).

[4] See Draft Order—Appendix A. The order was not signed by Circuit Justice John Paul Stevens since he was in Washington for hearings on his appointment to this honorable court.

value of human life. Its national office is located in Chicago, Illinois, and its membership includes approximately 20,000 persons located in every state of the union. Dr. Diamond is a member of the Board of Directors of AUL.[5]

The 1975 Abortion Act of the State of Illinois was passed over the Governor's veto on November 19, 1965 when the Illinois Senate voted 36 to 15 to override, the Illinois House having previously voted 109 to 44 to override. The provisions of the Illinois Abortion Act of 1975 legislate in areas which will be substantially affected by this Court's decision in this case, and which will profoundly affect Dr. Diamond's wards and the classes he represents.

For example, the Illinois Abortion Act of 1975 contains provisions relating to parental consent, spousal consent, informed consent, viability and protections for viable and live born children amongst others.[6] This court's decision will profoundly affect the validity or invalidity of those provisions and may thus have an immediate, profound and irreparable affect on the classes of unborn children, parents and spouses, all of which classes are represented by Dr. Diamond.

2. The Legal Position of these Amici. These amici support the Attorney General of Missouri and the constitutionality of the statute.

[5] A list of the Board of Directors and Officers of AUL can be found in Appendix B. AUL had previously filed a brief amicus curiae in *Roe* v. *Wade* and *Doe* v. *Bolton*.

[6] The 1975 Illinois Abortion Act can be found in Appendix C. On 12/2/75 the three Judge Court entered a preliminary Injunction against enforcement of the Act pending the outcome on the merits and this honorable Court's ruling herein.

3. Justification for Participation as Amici. As previously stated, the issues in this case, as well as the issues in the litigation pending in the Northern District of Illinois wherein Dr. Diamond has been appointed guardian ad litem for the class of Unborn Children are substantially similar and in some respects identical. Any adverse decision in this case will profoundly affect Dr. Diamond's wards as well as the other classes he represents.

The arguments which Dr. Diamond and AUL will present on behalf of the unborn which class is not *per se* represented by any other party in this case is a reasonable justification for participation by these Amici.

CONCLUSION

For the reasons stated and for additional reasons as contained in and expanded upon in the Brief itself, these amici respectfully request this Court to grant this Motion and grant leave for the filing of this Brief which is attached and served herewith.

Respectfully submitted,

By: .....

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Jan 5 1976

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BRIEF AMICUS CURIAE OF DR. EUGENE DIAMOND AND AMERICANS UNITED FOR LIFE, IN SUPPORT OF APPELLEES IN 74-1151 AND APPELLANTS IN 74-1419

NOTE

The Statement of Jurisdictional Grounds, The Constitutional Provisions Involved, The Questions Presented and The Statement of the Case are omitted from this amicus curiae Brief since they are amply stated and argued in the Brief of John C. Danforth, Attorney General of the State of Missouri.

THE STATUTE INVOLVED: THE MISSOURI ABORTION LAW

House Committee Substitute for House Bill No. 1211

Section 1. It is the intention of the general assembly of the state of Missouri to reasonably regulate abortion in conformance with the decisions of the supreme court of the United States.

Section 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:

(1) 'Abortion', the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) 'Viability', that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;

(3) 'Physician', any person licensed to practice medicine in this state by the state board of registration of the healing arts.

Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment;

(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion.

(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.

(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

Section 4. No abortion performed subsequent to the first twelve weeks of pregnancy shall be performed except where the provisions of section 3 of this act are satisfied and in a hospital.

Section 5. No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.

Section 6. (1) No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child,

and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo.

(2) Whoever, with intent to do so, shall take the life of a premature infant aborted alive, shall be guilty of murder of the second degree.

(3) No person shall use any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive.

Section 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411, RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.

Section 8. Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 7 of this act by the attending physician and the woman shall certify in writing that she had been so informed.

Section 9. The general assembly finds that the method or technique of abortion known as saline amniocenteis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy.

Section 10. 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

2. The forms shall be provided by the state division of health.

3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

Section 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years.

Section 12. Any practitioner of medicine, surgery, or nursing, or other health personnel who shall willfully and knowingly do or assist any action made unlawful by this

act shall be subject to having his license, application for license, or authority to practice his profession as a physician, surgeon, or nurse in the state of Missouri rejected or revoked by the appropriate state licensing board.

Section 13. Any physician or other person who fails to maintain the confidentiality of any records or reports required under this act is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

Section 14. Any person who contrary to the provisions of this act knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action required by this act shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

Section 15. Any person who is not a licensed physician as defined in section 2 of this act who performs or attempts to perform an abortion on another as defined in subdivision (1) of section 2 of this act, is guilty of a felony, and upon conviction, shall be imprisoned by the department of corrections for a term of not less than two years nor more than seventeen years.

Section 16. Nothing in this act shall be construed to exempt any person, firm, or corporation from civil liability for medical malpractice for negligent acts or certification under this act.

Section A. Because of the necessity for immediate state action to regulate abortions to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

Section B. If any provision of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity does not effect the provisions or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of the Act are declared to be severable.

SUMMARY OF ARGUMENT

Section 2(2)—The Definition of Viability

The definition of viability is a proper standard under *Roe* v. *Wade* and is not a vague "standard of possible evanescent survival." The trial testimony and the medical literature indicate conclusively that a determination of viability is a matter of medical judgment to be exercised by the physician "with reasonable medical certainty" which is the "judgment that physicians are obviously called upon to make routinely whenever surgery is considered" *U.S.* v. *Vuitch,* 402 U.S. 62, (1971). The word "indefinitely" does not alter or impinge the physician's use of his judgment but is, on the contrary, a valid statutory guide under *Roe* v. *Wade* to assist him in the use of his medical judgment. The current status of neonatal medicine clearly indicates that no specific statutory time definition of viability, such as at 24 weeks, is warranted since viability occurs at different times in different races and individuals. Live births with normal survival have been recorded as early as 22 gestational weeks (Appendix E) and 21 gestational weeks (*Planned Parenthood* v. *Fitzgerald,* ..... F. Supp. ..... (E.D.Pa. 1975)). Even Dr. Hall, a plaintiff herein, testified that viability was possible as early as 20 weeks (Tr. p. 369). As Plaintiffs admit in their brief (p. 26) at 19 weeks maternal mortality for abortion *exceeds* maternal mortality for live birth.

Section 6(1)—The Physician's Standard of Care

This section is constitutional when correctly interpreted in the light of the legislative history. As thus interpreted, it applies only after an abortion and mandates that medical care for the live born fetus which would be given to any infant born alive. Thus, this section seeks only to codify the physician's obligation to his other patient: the live born infant. That such codification is necessary is amply born out by the many reported instances of children born alive after legal abortion who are not given such care. The word "fetus" is not constitutionally infirm since it clearly refers only to live born fetus' after the abortion procedure who are thus viable which conforms to the legislative history of the act. As so interpreted, it is a proper exercise of a valid state interest in born life.

Section 3(2)—The Patient's Written Consent

Requiring the written and informed consent of the patient is a proper exercise in the state's interest in maternal health which may be exercised at any time during pregnancy. This is so because the requirement in no way infringes on her right to have an abortion and does not regulate the procedure itself. It merely requires proof that the physician has done what he must by law do in all medical procedures: obtain an informed consent. That such consents are not being obtained is clear from the evidence in this case. The physicians themselves are not obtaining informed consents but are leaving the job to non medical "counselors" whose economic interest in the outcome may be a conflict of interest with the woman's right to a freely given informed and uncoerced consent.

Section 3(3)—Spousal Consent

The Court in *Roe* stated that it would not determine whatever rights the father or husband might have in relation to the woman's decision to terminate her pregnancy. There is nothing in *Roe* which precludes the possibility that the state may raise separate "compelling" interests beyond the two raised by the statutes of Georgia and Texas of *Roe* and *Doe*—here, the state's interest in the "relation integrity", "bilateral loyalty", "mutuality", and "harmony in living" of the marriage relation through balancing the procreative and parental rights of husband and wife.

But *Roe* and *Doe,* unlike previous decisions, caused an imbalance in the procreative and parental rights of males and females. *Roe* acknowledged the difference between contraception and abortion. The "woman cannot be isolated in her privacy" because she carries an embryo, later a fetus. With the recognition of the fact that an embryo/fetus is not a mere "statistical" person—that barring disaster or human intervention a live child will be born—the Court must also recognize that no pregnancy and no occasion for abortion could ever arise without the biological contribution of the father i.e. the father's contribution to the initiation of a potential human life is equal to the mother's. Fully human or not, it follows that the father ought to have some power in the disposition of this potential human life, at least where he is willing to share or assume the burden (which he must by law in marriage) the birth of a new child presents.

In contraception, both parties are able to employ methods which would prevent fertilization—there is a balance of power. In abortion, both parties have initiated the process by which a child will be born; both parties (esp. if

married) must assume the legal responsibilities a child entails if born; either party or both parties may suffer the medical, emotional, social or economic disadvantages of a new birth; either or both parties may suffer emotional or physical disabilities if the pregnancy is terminated—but only one party may decide if the child is to be born or not.

Surely the father's procreative and parental rights cannot be said to be satisfied by mere fertilization followed by abortion: by the court's own standards he has accomplished only a potential human life. His interest is in the live birth of a child. Without such a statute, the father's procreative capacity is always subject to the condition subsequent of the mother's decision of whether or not *she* wants a child and the father's theoretical role in procreative decision-making is reduced to a mere "fertilizer" who must await later decision of the mother as to whether she shall bestow parenthood upon him or not; and no matter how poor her reasons, he has no power to impress his interests upon the reproductive process.

Section 3(4)—Parental Consent

The Parental Consent provision of the Missouri statute represents a legitimate exercise by the State of Missouri of its compelling state interest in the family. Many other state laws have similar requirements such as the necessity for parental consent before a minor can marry, which evidence a similar concern by the state. The testimony showed that present counseling is inadequate to protect the minor, especially one of very tender years, who is in most need of such help. The remote possibility of a parental veto can be cured through the statutory provision for the consent of a person in loco parentis.

Section 7—Termination of Parental Rights

Parental rights are properly terminated and fully protected by the statute. A rational interpretation of Sections 7 and 8 of the statute is that a constructive abandonment of the infant born alive after abortion has occurred. The state as *parens patria* has power to provide for the health and well-being of its live born children who have been abandoned by their parents. In the rare instance where aborting parents change their mind, the statute incorporates by specific reference the full panolopy of parental due process rights before permanent termination.

Section 9—The Prohibition of Saline

The statute properly prohibits saline abortions after the first trimester as a valid exercise of its compelling interest in maternal health. Saline abortions have been abandoned in Japan because of the catastrophic consequences to maternal health. There always are certain medical side effects with saline such as bleeding coagulopathies. Prostaglandins are considerably safer; *e.g.* the maternal mortality for saline equals or exceeds the maternal mortality for live birth whereas it is negligible or non-existent for prostaglandins. Plaintiffs argue that saline is the most widely used form of mid-trimester abortion and therefore the statute interferes with the physician's right to practice medicine which he has a right to do no matter what the risk is for his patient. However, it is clear that the state may regulate abortions for purposes of maternal health and, in the words of Judge Learned Hand, "a whole calling may have unduly lagged in the adoption of new and available devices". Prostaglandins are available now for mid-trimester abortions and, as Judge Hand said, "there are precautions so imperative that even their universal disregard will not excuse their omission".

Sections 10 and 11—Record Keeping and Reporting

Roe and *Doe* do not prohibit record keeping and reporting which is reasonable. This Court in *Doe* v. *Bolton* specifically maintained as constitutional the statutory provision that a physician's judgment be reduced to writing. Maintenance of certain reasonable records relating to abortion is no different than the maintenance of birth, death or marriage certificates by statute. Confidentiality is preserved and the physician's practice is not infringed. Sections 10 and 11 are merely enabling legislation and no regulations currently exist to be considered by this Court. No presumption of unconstitutionality for non-existent regulations seems warranted.

ARGUMENT

I.

INTRODUCTION

The sole purpose and intention of this Brief amicus curiae is to present legal arguments in support of the constitutionality of the Missouri abortion statute being challenged in this appeal and to demonstrate that the statute conforms to the standards previously enunciated in decisions of the Supreme Court of the United States. Nonetheless, it is the position of these amici that the basic abortion decision handed down by this Court in *Roe* v. *Wade* is not constitutionally sound, should be carefully reconsidered and should be narrowed rather than broadened in its implications.

The Missouri legislature did not, however, intend to enact a statute inconsistent with this Court's 1973 abortion decision with the aim of asking this Court for a general reconsideration of *Roe* v. *Wade*. Quite the contrary is shown by the first provision of the Missouri abortion statute, which unequivocally expresses the intention of the Missouri legislature "to reasonably regulate abortion in conformance with the decisions of the Supreme Court of the United States".

The introductory part of this Brief, although clearly critical of the basic Supreme Court abortion decisions, is offered for four purposes directly related to this litigation: first, to emphasize the constitutional unsoundness of *Roe* v. *Wade* as a primary reason for asking this Court in the context of this appeal not to extend *Roe* v. *Wade* beyond its narrowest perimeters; second, assuming arguendo

that this Court is inclined to question the constitutionality of certain provisions of the Missouri statute, to provide the essential background for a request of this Court to reconsider *Roe* v. *Wade* to the extent necessary to uphold the statutory provisions challenged in this litigation; third, to present the basic due process theories which underlie the enactment of both the Missouri abortion statute as well as the similar Illinois abortion statute of 1975, which these amici presently defend as intervenors; and fourth, to achieve a balance in the context of this litigation by responding to certain introductory statements of Plaintiff in their brief which go far beyond the various issues presented in this case, as, for example, the religious divisiveness argument found on pages 33-36 of Plaintiff's brief.

Our purpose, in this regard, is to explain to this Honorable Court that those who oppose the legalization of abortion do so for sound *legal reasons:* the protection of the civil right to life, an humane endeavor consistent with the great civil rights traditions of this Nation and no different than the protest, recorded in the honorable history of this Nation, which followed the former decision of this Court in *Dred Scott* v. *Sanford,* 19 How. 493 (1857). If the legal theory advanced by these amici in support of the civil right to life of the unborn is shared by others, for, *inter alia,* religious reasons, then that is their right. That certain persons, applying the principles of their theology, conclude that fetal life is human life and thus of inherent value does not detract from the significance of our argument, which is based on a rational and legal analysis of the United States Constitution and the legal history of this Nation—the first and greatest Nation in the protection of civil and political rights of the individual human being.

If the above is not sufficient reason for Part I of this Brief or if it is considered irrelevant to the issues in this case as understood by this Court, this Court is invited to proceed directly to Parts II et seq. which discuss certain specific narrow issues in this case as raised in both Plaintiffs' and Defendants' Jurisdictional Statements and Briefs on the Merits.

Abortion Is a Human Rights Issue

Abortion is a human rights issue. Abortion involves the most fundamental of all human rights—the right to life—without which no other human right could exist unless in mockery. As Justice Brennan wrote, in speaking for the abolition of the death penalty for convicted felons:

> "The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death.[1]
>
> Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is not the ultimate sanction.'"[2]

In the abortion issue we have been debating the most fundamental human rights issue: when does each individual's civil right to life commence? Not unlike the *Dred Scott*[3] decision, *Roe* v. *Wade*[4] has answered that question

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[1] *Furman* v. *Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 382 (1972).

[2] Ibid. 408 U.S. 238, 33 L.Ed. 2d 346, 376.

[3] *Dred Scott* v. *Sanford,* 19 How. 493, 15 L.Ed. 691 (1857).

[4] *Roe* v. *Wade,* 410 U.S. 113 (1973) hereafter referred to simply as *Roe.*

in a fashion that will breed debate as long as it remains on the books. *Roe* v. *Wade* decreed that the developing human in the womb is not entitled to constitutional personhood.[5] Corporations, supposedly because they enjoy individuality, are persons under the constitution,[6] but actual, individually existing human beings are not, merely because their development at this stage of life occurs en utero![7] What can one say about such a decision?

In the Yale Law Journal, Professor John Hart Ely, who states that the result meet with his idea of progress, writes nonetheless as follows:

> "Nevertheless it is a very bad decision. Not because it will perceptibly weaken the court—it won't; and not because it conflicts with either my idea of progress or what the evidence suggests is society's—it doesn't. It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[8]

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[5] See dissent of Justice White *Roe* v. *Wade*, 410 U.S. 113, 221-223 where at page 222 he uses that now famous expression characterizing the majority opinion as "an exercise of raw judicial power."

[6] *Santa Clara County* v. *Southern Pacific Railroad Co.*, 118 U.S. 394 (1886) where at page 396 the court said: "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

[7] *Roe* v. *Wade*, 410 U.S. 113, 158.

[8] Ely, John Hart "The Wages of Crying Wold: A Comment on *Roe* v. *Wade*" The Yale Law Journal, Vol. 82, 1973 pp. 920-949 at p. 947.

He concludes his criticism by pointing out that the court has "an obligation to trace its premises to the charter from which it derives its authority".

"But", he says, "if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the court has no business imposing it. I hope that will seem obvious to the point of banality. Yet those of us to whom it does seem obvious have seldom troubled to say so. And because we have not, we must share in the blame for this decision".[9]

What can one say of the fact that lower Federal Courts see in *Roe* v. *Wade* a mandate to impose the new order of ethics[10] on an unwilling society by mandating public and private hospitals to perform abortions,[11] by declaring conscience clauses void,[12] by mandating the use of public funds to pay for abortions?[13] Perhaps Mr. Justice White

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[9] Ibid. at p. 949. Prof. Ely also remarks: "Abortion ends (or if it makes a difference, prevents) the life of a human being other than the one making the choice". Ibid. at p. 924.

[10] "A New Ethic for Medicine and Society", *California Medicine*, official Journal of the California Medical Association, 113, pp. 67-68, Sept. 1970.

[11] Public Hospital: *Nyberg* v. *City of Virginia*, 495 F. 2d 1342 (8th Cir. 1974).
Private Hospital: *Doe* v. *Charleston Area Medical Center Inc.*, ... F. 2d ..... (4th Cir. 1975) decided Nov. 6, 1975 #75-1161.

[12] *Wolf* v. *Schoering*, 388 F. Supp. 631 (W.D. Ky. 1975).

[13] *Klein* v. *Nassau County Medical Center*, 347 F. Supp. 496 (E.D. N.Y. 1972).

directed himself to this question when he wrote in his dissent in the *Greco* case:

> "The task of policing this Court's decision in *Roe* v. *Wade*, 410 U.S. 113, and *Doe* v. *Bolton*, 410 U.S. 179, is a difficult one; but having exercised its power as it did, the Court has a responsibility to resolve the problems arising in the wake of those decisions."[14]

Was that statement a reference to the extent to which lower Federal Courts are completely ignoring the clear limitations to the right to privacy explicitly expressed in *Roe* v. *Wade* in order to create an absolute constitutional right to abortion in a woman? The extent to which proponents of abortion are seeking to push *Roe* v. *Wade* is clear from the concerted attack on private hospitals and conscience clauses in spite of the fact that both are directly protected by *Roe* v. *Wade* and *Doe* v. *Bolton*.[15]

Perhaps Justice White also had in mind cases such as the instant case where a fair reading of Plaintiff-Appellants' brief and the record supports the inference that Plaintiffs contend that *Roe* v. *Wade* stands for the proposition that the woman has a constitutional right to a dead fetus.[15a]

Perhaps it is the harsh realities of abortion that finally will bring home to this Honorable Court the true nature of this debate. Those harsh realities are causing even the

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[14] *Greco* v. *Orange Memorial Hospital Association Corporation*, ... U.S. ..... 12-1-75, No. 75-432. Slip Opinion p. 6.

[15] *Doe* v. *Bolton*, 410 U.S. 179 (1973).

[15a] See Appellant's Brief pp. 108 and 111 and see Trial Record where Plaintiff's direct and cross examination sought to elicit such "admissions" from witnesses. See e.g. Plaintiff attorney's cross examination of Dr. Anderson.

most avid proponents of legal abortion to reconsider their position in this debate and to ask anew what effect legalized killing will have on our society. Dr. Bernard N. Nathanson, M.D. in the New England Journal of Medicine[16] recently called attention to this dilemma. Nathanson, a founder of the National Association for Repeal of Abortion Laws (NARAL) and previously very active in the movement to legalize abortion, recently resigned his position as Director of the Center for Reproductive and Sexual Health where 60,000 abortions had been performed. While still claiming that abortion should be legal he, nonetheless, had the courage to say:

> "Sometime ago—after a tenure of a year and a half —I resigned as director of the Center for Reproductive and Sexual Health. The Center had performed 60,000 abortions with no maternal deaths—an outstanding record of which we are proud. However, I am deeply troubled by my own increasing certainty that I had in fact presided over 60,000 deaths.
>
> "There is no longer serious doubt in my mind that human life exists within the womb from the very onset of pregnancy, despite the fact that the nature of the intrauterine life has been the subject of considerable dispute in the past. Electrocardiographic evidence of heart function has been established in embryos as early as six weeks. Electroencephalographic recordings of human brain activity have been noted in embryos at eight weeks. Our capacity to measure signs of life is daily becoming more sophisticated, and as time goes by, we will doubtless be able to isolate life signs at earlier and earlier stages in fetal development.
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> "The Harvard Criteria for the pronouncement of death assert that if the subject is unresponsive to external stimuli (e.g., pain), if the deep reflexes are

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[16] Vol. 291, No. 22 (11-28-74) p. 1189.

absent, if there are no spontaneous movements or respiratory efforts, if the electroencephalogram reveals no activity of the brain, one may conclude that the patient is dead. If any or all of these criteria are absent—and the fetus does respond to pain, makes respiratory efforts, moves spontaneously, and has electroencephalographic activity—life must be present.

"To those who cry that nothing can be human life that cannot exist independently, I ask if the patient totally dependent for his life on treatments by the artificial kidney twice weekly is alive? Is the person with chronic cardiac disease, solely dependent for his life on the tiny batteries on his pacemaker, alive? Would my life be safe in the city without my eyeglasses?

"Life is an interdependent phenomenon for us all. It is a continuous spectrum that begins in utero and ends at death—the bands of the spectrum are designated by words such as fetus, infant, child, adolescent, and adult.

> "We must courageously face the fact—finally—that human life of a special order is being taken. And since the vast majority of pregnancies are carried successfully to term, abortion must be seen as the interruption of a process that would otherwise have produced a citizen of the world. Denial of this reality is the crassest kind of moral evasiveness."

Such is the point of view of the sophisticated physician who has suddenly and realistically viewed the issue after participation in thousands of abortions. How the average juror views the related issue of viability after experiencing it first hand was well described by an interview of a juror in the Boston trial of Dr. Edelin which appeared in Harper's Weekly:[17]

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[17] Harper's Weekly, Vol. 64, No. 3116 (3-14-75).

"Only a few juries in recent memory have excited as much curiosity—and antagonism—as the one that delivered the surprise manslaughter conviction of Boston obstetrician Dr. Kenneth Edelin. For Anthony Alessi, a 30-year-old supervisor at the New England Telephone Company and a part-time student at Northeastern University, the Edelin trial provided his first jury experience. A Baptist (despite reports that all the jurors were Catholic) and the father of three, Alessi has lived in the predominantly black Roxbury section of Boston for the past 16 years.

"Alessi agreed to talk to *Harper's Weekly* because of what he considers unfair and untrue allegations about the group's racism by one of the alternate jurors. He was interviewed by Alan Geismer.

"Since the guilty verdict, it's been repeatedly argued that the real issue was not manslaughter but abortion. How do you feel about that?

"I completely disagree. Even after everything I've been able to read, I still think manslaughter was the only issue. . . .

"From the time we started deliberating I don't think the word 'abortion' came up twice. When it did, we all agreed that yes, there had been a legal abortion and that once the baby was detached from the mother the doctor's obligation to the mother was completed. But then we asked ourselves; did the doctor owe this baby an obligation although, granted, he was doing an abortion? And the answer we came to was, yes, that under his oath as a doctor, he owed it to the baby to do more to preserve its life, since he had in his hand an individual human life separate from the mother.

"Q. How did you decide the question of viability?

"A. We had to decide if the baby had taken a breath outside the womb. I think that we really believed Dr. J. F. Ward [a Pennsylvania pathologist called by the prosecution] that the lungs showed the baby had taken a breath. For many of us he was the decisive witness.

Of course, only one person could prove viability and that was the baby itself. We felt the doctor [Edelin] didn't give the baby enough of an opportunity. He said he placed his hand on the baby's chest for 3 to 5 seconds. We didn't weight this as a real attempt to see if the baby was alive. We also took under consideration that the mother was under heavy sedation and that therefore the baby was too. With all this, well, we felt Dr. Edelin just didn't give it enough of a chance and that he should have.

"Q. What about the controversial picture of the fetus that was admitted into evidence?

"A. When it was first introduced and passed among us, the picture did have a traumatic effect on some of the girls, who didn't even want to look at it. But it was very important in our final deliberations. We passed all the evidence around the table and everyone looked at each piece, but we paid a lot of attention to that picture. None of us had ever seen a fetus before. For all we knew a fetus looked like a kidney. The picture was obviously of a well-formed baby, over 13 inches long. It didn't carry undue weight, but it helped us see what a baby looks like at that weight.

"Q. What is your reaction to the charges by one of the alternate jurors and others that racism motivated the verdict?

"A. I was shocked. Nothing like that ever came out in our discussions. There was no discrimination or racist talk that I heard. Those charges are simply ludicrous. We all knew the aborted baby was black—it was in the indictment—but, my God, I never realized Dr. Edelin was black until after the trial. . . ."

It was apparent to these jurors that the issue was human life—in this instance viable human life—and the obligation of society through its physicians to protect that life.

American College of Obstetrics and Gynecology Recognizes Physician's Duty to Viable Fetus

The sophisticated medical mind and the common sense of the juror once more meet in the resolution of an important legal issue. Just as the juror felt that Dr. Edelin had not done enough to preserve the life of the viable fetus, so too, the American College of Obstetrics and Gynecology (ACOG) in response to a request to file an amicus brief in support of Dr. Edelin, replied with a statement of policy which clearly enunciates concern for the viable fetus and states that "the physician does not view the destruction of the fetus as the primary purpose of abortion." The ACOG policy statement, as reported in Ob. Gyn. News December 15, 1975 p. 1, 18, reads in part:

> the College affirms that [resolution of a conflict between a pregnant woman's health interests and fetal welfare] . . . in no way implies that the physician has an adversary relationship toward the fetus and, therefore, the physician does not view the destruction of the fetus as the primary purpose of abortion. The College consequently recognizes a continuing obligation on the part of the physician toward the survival of a possibly viable fetus where this obligation can be discharged without additional hazard to the health of the mother.

The German Opinion[18]

On February 25, 1975, the Federal Constitutional Court of West Germany announced its final judgment holding unconstitutional Section 218A of the Fifth Statute for the

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[18] Translated by John Gorby and Robert Jonas directly from the slip opinion. Consequently no citations will be given to pages since the slip opinion is generally unavailable in this country. The complete translation of Mr. Gorby and Mr. Jonas of this historic opinion will soon be published in the John Marshall Law Journal, Vol. 9, No. 3, 315 Plymouth Ct., Chicago, Ill. 60604 or Americans United For Life Inc., 230 N. Michigan, Chicago, Ill. 60601.

Reform of the Penal Law which had depenalized abortion in the first trimester. On June 21, 1974, the Court, upon the application of the State of Baden Wurttemberg, issued a provisional order staying the effect of 218A until this final judgment. The case was ultimately heard on application of 193 members of the German Federal Parliament and five States: Baden-Wurttemberg, Bavaria, Rhineland-Pfalz, Saarland, and Schleswig-Holstein. The Court was divided 6-2 on the final judgment, Justices Rupp-von Brunneck and Simon, dissenting.

The dissenting opinion neither questioned the constitutional personhood ("legal value") of the unborn nor did it quarrel with the legal necessity for protecting unborn life; the issue over which the Constitutional Court split was the manner in which the state fulfills its constitutional obligation to protect unborn human life. The dissenting opinion begins with these words:

> "The life of each individual human being is self-evidently a central value of the order of justice. It is uncontested that the constitutional duty to the protection of life includes also its steps before birth. The explanations in Parliament and before the Federal Constitutional Court concern not the *whether,* but on the contrary only the *how* of this protection." (Emphasis in original)

In the Court's opinion, the following was written: "The express incorporation into the basic law of the self-evident right to life, in contrast to the Weimer Constitution, may be explained principally as a reaction to the 'destruction of life unworthy of value' to the 'final solution' and 'liquidations' which were carried out by the National Socialist Regime as measures of State."

The Court construed the word "everyone" in the constitutional language "everyone has the right to life . . ." to

mean life in the sense of historical existence of a human individual as it exists according to definite biological and physiological knowledge.

"The process of development which has begun at that point", the Court said, "is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of human life." The Court stated:

> "The right to life is guaranteed to everyone who lives; no distinction can be made here between various stages of the life developing itself before birth or between unborn and born life. Everyone in the sense of Article 2, Para. 2, Sentence 1, of the Basic Law is 'everyone living'; expressed in another way: every life possessing human individuality; 'everyone' also includes the yet unborn human being."

In opposition to the argument that the word "everyone" commonly denotes only a born or completed person, the Court argued:

> "The security of human existence against encroachments by the State would be incomplete if it did not also embrace the prior step of 'completed' life, that is unborn life."

In substantiating its position, the Federal Constitutional Court reviewed the legislative history and concluded that it was clearly intended, although not without some dissent, that the word "everyone" would include unborn life.

The Court found a duty on the State to protect every human life and deduced this duty directly from Article 2, Para. 2, Sent. 1, of the Basic Law. It also deduced it from other sections of the constitution which give basic guarantees to human dignity: "Where human life exists, human dignity is present in it; it is not decisive that the bearer of this dignity himself be conscious of it and knows per-

sonally how to preserve it. The potential faculties present in a human being from the beginning suffice to establish human dignity," noted the German Constitutional Court.

No obligation can rest more highly on the State than its obligation to protect life. The Court stated:

> "The degree of seriousness with which the State must take its obligation to protect increases as the rank of the legal value in question increases in importance within the order of values of the Basic Law. Human life represents, within the order of the Basic Law, an ultimate value, the particulars of which need not be established; it is the living foundation of human dignity and the prerequisite for all other fundamental rights."

This obligation exists "even against the mother".

In considering the arguments, the Court indicated that if the embryo were considered only a part of the material organism, the interruption of pregnancy would then belong in the private area of one's life where the legislature is forbidden to encroach. "Since, however, the one about to be born is an independent human being who stands under the protection of the constitution, there is a social dimension to the termination of pregnancy which makes it amenable to and in need of regulation by the State."

The Court recognized the right of the woman to the free development of her personality, or, as we say, her right of privacy. But the Court noted that this right, however, is limited, as are all such rights, by the rights of others, the constitutional order, and the moral law. "A compromise which guarantees the protection of the life of the one about to be born and permits the pregnant woman the freedom of abortion is not possible, since the termination of pregnancy always means the destruction of the unborn life."

The Court discussed the traditional method of handling the clash of constitutional rights, namely, balancing conflicting rights, and concluded that "precedence must be given to the protection of the life of the child about to be born. This precedence exists as a matter of principle for the entire duration of pregnancy and may not be placed in question for any particular time." The Court found a duty to carry a pregnancy to term and therefore viewed its interruption as an injustice as a matter of principle, indicating that the condemnation of abortion must be clearly expressed in the legal order. The failure of the statute involved to clearly express this condemnation was the majority's primary reason for holding it unconstitutional. The State may not abstain from the value judgment that human life is a value to be protected by the State. It may not abandon this judgment to the decision of the individual to be made on the basis of that individual's own sense of responsibility.

The dissent argued that the responsibility lay with the legislature, and it had adequately discharged that responsibility in the law which it had drafted. There was also no constitutional mandate, the dissent said, requiring penal sanctions.

The majority, it should be noted, did not really say that penal sanctions are required. It did state, however, that it is the task of the State to affirmatively employ social, political and welfare means for securing developing life. How these means are carried out is the prerogative of the legislature as long as the fundamental legal norms contained in the constitution are complied with. The Court found a duty in the State to "strengthen readiness of the expectant mother to accept the pregnancy as her own responsibility and to bring the child *en ventre sa mere* to full life". Why is this so? Because "it should not be

forgotten that developing life itself is entrusted by nature in the first place to the protection of the mother". The Court distinguished between the State's obligation to employ the same penal measures for the protection of unborn life as is necessary and expedient for born life, taking pains to point out, however, that: "The interruption of pregnancy irrevocably destroys an existing human life. Abortion is an act of killing; . . .".

In discussing the penal sanctions the Court determined that punishment is not an end in itself. The employment of punishment is subject to the decision of the legislature and the standard to be used by the Court is to decide whether or not the totality of measures serving the protection of unborn life correspond to the importance of the legal value to be secured.

Consequently, "the seriousness of the sanction threatened for the destruction is to correspond to the worth of the legal value threatened for destruction. The elementary value of human life requires criminal law punishment for its destruction".

However, because of the unique situation of the pregnant woman, employment of the penal law or punishment may give rise to special problems. This leads to the difficult question of "exactability", or whether the State "may compel the bearing of the child to term within means of the penal law".

Here the Court found a conflict between respect for the unborn life and the right of the woman not to be compelled to sacrifice the values in her own life in excess of an exactable measure. The majority agreed that a decision for an interruption of pregnancy can attain the rank of a decision of conscience worthy of consideration, but here the legislature is obligated to exercise special restraint. "If in

these cases it views the conduct of the pregnant woman as not deserving of punishment and foregoes the use of penal sanctions, the result is to be constitutionally accepted as a balancing encumbent upon the legislature." What are such circumstances?

The first and obvious is when termination of the pregnancy is necessary to prevent the death of the woman. Beyond that the Court indicated the legislature has a free hand in other cases of extraordinary burdens. The Court included eugenic cases in this category.

It was the aspect of the law as teacher which seems to have had a most profound influence on the manner in which the decision was written. For example, the Court argues that if abortion is allowed on request during the first trimester, all sense of the law's teaching concerning the sanctity of human life will be obliterated. Therefore, the legislature violates its duty under the constitution to protect human life if it were to allow abortion on request. However, if the legislature in its wisdom selects those particularly hard cases in which the woman cannot be compelled to complete the pregnancy because of serious threats to life and health, then the legislature does not abandon its obligation under the constitution. In fact, it strengthens that obligation because, knowing that these difficult cases are cases in which carrying the pregnancy to term cannot be exacted from the woman, it develops a system of counselling and aid to help her through the pregnancy so that the State can fulfill its obligation to all human life.

The Right to Life Is The Necessary Foundation for All Other Rights

That Mr. Justice Blackmun appears to accept the scope of constitutional personhood as the primary issue is re-

flected in his comment in *Roe* that "(t)he appellee (Texas) and certain amici argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment . . . If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment." (410 U.S. at 156, 157). No one has openly quarreled with Mr. Justice Blackmun on this point, and there is good reason for this. Not only do both the Fifth and Fourteenth Amendments explicitly mention "life" in their respective "due process' clauses,[19] but common sense dictates that the right to life is a condition precedent to the enjoyment and exercise of all other fundamental rights, including Mr. Justice Douglas's "absolute" First Amendment rights,[20] and is the necessary foundation upon which all other human rights are built. After all, only the living can enjoy the "freedom of speech", the "right peaceably to assemble", the "right of Assistance of Counsel", the "right of privacy", or even the "right to decide to have an abortion". And as a general principle only those who feel that their "right to life" is secured will dare exercise any of the above fundamental rights. Mr. Justice Brennan expressed the idea simply in *Furman* v. *Georgia*: "An executed person has indeed 'lost the right to have rights.'"[21]

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[19] It is interesting to note in this connection that "due process of law" is the constitutional protection of the Right to Life. Cf. H. Bedau, "The Right to Life", in *The Monist*, Vol. 52, No. 4 (Oct. 1968) at p. 562.

[20] See the concurring opinion of Mr. Justice Douglas, in *Roe*, 410 U.S. at p. 211.

[21] 408 U.S. 238 at p. 290.

The Right to Life Is Guaranteed by The Constitution

John Locke, whose influence on the thinking of the founders of this nation is well known, wrote in his Second Treatise of Civil Government of the natural rights to life and property.[22] These basic ideas found their way into the Declaration of Independence of July 4, 1776, in the clause to which the people of this nation are so frequently rededicating themselves this bicentennial year:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, . . . That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles . . ."

Just fifteen years later, on Dec. 15, 1791, a time when the natural rights theories were still dominant, the "right to life" was explicitly included in the U.S. Constitution via the Fifth Amendment's due process clause.[23]

In speaking of the first official action of this nation, which declared the foundation of our government in those words, the United States Supreme Court has said that ". . . it is always safe to read the letter of the constitution in the spirit of the Declaration of Independence."[24] Then,

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[22] Locke, John *The Second Treatise of Civil Government*, Chapter II "Of the State of Nature".

[23] Bedau, H. Op. cit., Note 19 Supra.

[24] *Gulf, Colorado and Santa Fe R.R. Co.* v. *Ellis*, 165 U.S. 150, 160 (1897).

commenting upon the basic function of government, the court said:

> "No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." [25]

The concern here is with the attempt to secure that equality of civil rights on behalf of the unborn child in a society which, if it has not abolished the child's civil right to life altogether, has made such inroads on its exercise as to make mention of it a mockery. For what difference does it really make to protect human life in the third trimester, since every individual human being must first pass through the unprotected first and second trimesters?

Although natural law thinking underwent hard times in intellectual circles during the nineteenth century, the importance of the right to life in modern political and social theory has remained nearly unscathed as is evidenced not only by the Fourth Article of The Universal Declaration of Human Rights, according to which "Everyone has the right to life . . .", but also by the Second Article of the European Human Rights Convention, [26] and the movement to abolish capital punishment.

Considering the Court in *Roe* clearly recognized the right to life issue as crucial and was fully aware of the

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[25] Ibid. at p. 160.

[26] "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence by a court following his conviction of a crime for which this penalty is provided by law". Article Two, European Human Rights Convention.

rank of this right in the hierarchy of fundamental legal values, a careful and through study of the scope of constitutional personhood as well as the nature of the unborn was certainly to be expected. After all, the last time the Court excluded a human group from the enjoyment of constitutional privileges and immunities, profound tragedy resulted. (See Mr. Justice Taney's decision in *Dred Scott* v. *Sanford,* [27] that slaves were property and that "free persons of color" were not citizens of the United States within the meaning of the Constitution.)

Does the possiblility exist that in the Court's eyes the major issue was not the scope of constitutional personhood as stated but rather other far reaching problems? Some indication of this is given in the *Roe* opinion itself. At the end of the opinion, Mr. Justice Blackmun wrote: "this holding, we feel, is consistent . . . (inter alia) . . . with the demands of the profound problems of the present day". [28] Although he does not specifically state what these problems are, Mr. Justice Blackmun provides at least a hint by mentioning at the beginning of the opinion that: "population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem". [29] If the Court's concern was to resolve or alleviate these "profound problems" by allowing population reduction via the sacrifice of unborn humans, the Court should say so and allow the matter to be debated on the merits rather than presenting the problem of *Roe* in terms of construing several potentially conflicting clauses of the Federal Constitution which guarantee individual rights.

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[27] 19 How. 393, 15 L.Ed. 691 (1857).

[28] 410 U.S. at p. 165.

[29] 410 U.S. at p. 116.

The consequence of the *Roe* decision to the unborn is as severe and final as one can imagine. This, of course, is of no great concern to the rule of law, unless the unborn does meet the criteria of constitutional personhood and the Court either because of poor reasoning or some unstated reason arbitrarily denied the unborn the constitutional protections due it or unless the Fourteenth Amendment is inadequate as a legal device to protect the fundamental rights of all members of the human family. In either case, there is reason for concern, for the legal order has failed. Perhaps society has failed as well by not providing other solutions which were acceptable to women facing unwanted pregnancies. Professor John Ely of Yale obviously had a point when he wrote "having an unwanted child can go a long way toward ruining a woman's life."[30] No one is denying the personal tragedy or the hardships involved in an unwanted pregnancy. The issue, however, is what is being sacrificed to avert the tragedy and hardships. These are hard decisions.

Courts as well as people have faced difficult problems before and have resolved them with dignity and intellectual honesty. Such was the problem in the famous cases of *U.S.* v. *Holmes,*[31] where, following a shipwreck, the sailors threw fourteen passengers overboard to lighten a sinking life boat, and *Regina* v. *Dudley and Stephens,*[32] where two seamen, after 14 days in an open boat and starving, killed a youthful companion and fed on his flesh until they were rescued. In both of these cases the doctrine of "necessity"

[30] Op. cit. Note 8 Supra at p. 923.

[31] 26 F. Cas. 36 (1842).

[32] 14 Q.B.D. 273 (1884).

was raised; and "necessity" there was—no less than the lives of those later accused of homicide were at stake. These were hard decisions, harder than the abortion decision because rarely is the "necessity" in the abortion situation of the magnitude of that facing Holmes, Dudley and Stephens. Nonetheless, the courts held that "necessity cannot justify killing".

Is that what is involved in the abortion controversy? Is abortion an act of killing? The West German Federal Constitutional Court concluded it was and attempted to resolve the abortion problem in a manner consistent with its understanding of the values involved and their authoritative legal principles. In its concluding paragraphs, the West German Federal Constitutional Court wrote:

> The parliamentary discussions about the reform of the abortion law have indeed deepened the insight that it is the principal task of the state to prevent the killing of unborn life through enlightenment about the prevention of pregnancy on the one hand as well as through effective promotional measures in society and through a general alteration of social concepts on the other.[33]

Such an approach would be much more compatible with the deepest values and the authoritative ideals of this society.

To those who see abortion as dangerously close to infanticide, the Court owed a sound distinction. To those who believe the rule of law entails the element of reason, the Court owed more than an arbitrary command. To both of these, the Court failed.

[33] Op. cit. Note 18 Supra.

As Philip Selznick has pointed out, "judicial conclusions gain in legal authority as they are based on good reasoning, including sound knowledge of human personality, human groups, human institutions".[34] Accepting this, *Roe* may be the command of the sovereign; but it certainly is lacking in legal authority. To this extent, a woman's right to an abortion is hollow indeed.

The Unborn Child Has A Constitutional Right to Life Which Exists En Utero

As Dr. Nathanson has said: "There is no longer serious doubt in my mind that human life exists within the womb from the very onset of pregnancy, despite the fact that the nature of intrauterine life has been the subject of considerable dispute in the past."[35]

In September, 1948, the World Medical Association (to which the United States is a founding member), "after a lengthy discussion of war crimes based on information from the United Nations War Crimes Commission"[36] adopted the Declaration of Geneva which said, "I will maintain the utmost respect for human life, from the time of conception; even under threat, I will not use my medical knowledge contrary to the laws of humanity".[37]

This was followed in October, 1949, by the International code of Medical Ethics which stated, "A doctor must always bear in mind the importance of preserving human life

[34] Selznick, Philip Natural Law in Golding, The Nature of Law.

[35] Op. cit. Note 16. Supra.

[36] World Medical Assoc. Bulletin, Vol. 1, p. 22, April 1949.

[37] Ibid.

from the time of conception until death".[38] At that time, Dr. Paul Cibrie, Chairman of the Committee which had drawn up the International Code, stated that the abortionists were in fact condemned in the Declaration of Geneva.[39] This was reaffirmed by the World Medical Association in 1970 with the Declaration of Oslo, "the first moral imposed upon the doctor is respect for human life as expressed in the clause of the Declaration of Geneva: 'I will maintain the utmost respect for human life from the time of conception' ".[40]

Furthermore, on November 20, 1959, the General Assembly of the United Nations *unanimously* adopted the Declaration of the Rights of the Child. The Preamble to the declaration stated that the child, by reason of his physical and mental immaturity, needs "special safeguards and care, including appropriate legal protection, before as well as after birth".[41] Governments were called upon to recognize the rights and freedoms set forth in the Declaration

[38] World Medical Association Bulletin, Vol. 2, pp. 5-34, January 1950.

[39] Ibid.

[40] Ibid.

[41] *Everyman's United Nations,* a complete handbook of the activities and evolution of the United Nations during its first twenty years, 1945-1965, 8th ed. United Nations, N.Y. at p. 360. It should be remembered that these are not just pious statements uttered only to be forgotten. At the War Crimes trial of the abortionists at Nuremberg the prosecutor argued that denial of legal protection to unborn children of Russian and Polish women was a crime against humanity. See closing Brief of Prosecution at 1077, *U.S.* v. *Griefelt,* 4 Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10 (1946).

and to strive for their observance by legislative and other measures.

In addition, the avidly pro-abortion California Medical Association wrote in September, 1970 that "human life begins at conception and is continuous whether intra- or extra-uterine, until death".[42] Dr. Alan Guttmacher, pro-abortionist head of Planned Parenthood-World Population, has written that at the exact moment of conception a new baby is created and that "at the exact moment when a new life is initiated (fertilization), a great deal is determined which is forever irrevocable—its sex, coloring, body-build, blood group, and in large measure its mental capacity of emotional stability".[43]

It is clear that human life, human life developing in the womb, commences its individual existence at conception or shortly thereafter. If individual human life is of intrinsic legal value in this Nation, a Nation dedicated to the protection of the rights of man, this value ought by logic and constitutional history, be protected by the Constitution, the very document which purports to put in positive form these fundamental rights. When this civil right commences as a constitutional right is the heart of the abortion controversy. The proponents of legalized abortion argue that it commences at "meaningful live birth". These amici argue that it commences en utero when individual human existence commences. These ideas are recurrent in this litigation. In determining the scope of *Roe* v. *Wade* as it applies in the context of this case, these amici ask this Court to consider these arguments.

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[42] Op. cit. Note 10 Supra.

[43] Guttmacher, Alan, *Having a Baby*, Signet Books, New York, New American Library, 1950 at p. 15.

II.

APPLICABLE LEGAL PRINCIPLES

Neither the Right of Privacy Nor Its Extension, the Right to Decide to Have an Abortion, Are Absolute

This Honorable Court in *Roe* v. *Wade* concluded that the "right of privacy, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy".[44] A considerable effort, however, was made by both the majority and the concurring justices to indicate that this extension of the right of privacy is subject to limitation. In short, this Court never intended to create an absolute right to an abortion. This is clearly shown by several passages in the *Roe* and *Doe* decisions, several of which are quoted below:

> "We, therefore, conclude that the right of personal privacy includes the abortion decision, *but that this right is not unqualified and must be considered against important state interests in regulation.*" (Emphasis added) (Roe v. Wade, 410 U.S. at 154)

> "Although the results are divided, most of these courts have argued that the right of privacy, however based, is broad enough to cover the abortion decision; *that right, nonetheless, is subject to some limitations;* and that at some point the state's interests as to protection of health, medical standards, and prenatal life, become dominant. *We agree with this approach.* (Emphasis added.) (410 U.S. at 155)

> "The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical

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[44] 410 U.S. at 153.

standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulations of the factors governing the abortion decision. *The privacy right involved, therefore, cannot be said to be absolute.* In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. *The Court has refused to recognize an unlimited right of this kind in the past.*" (Citations) (Roe v. Wade, 410 U.S. at 154) (Emphasis added).

and in *Doe* v. *Bolton,* this Court wrote:

> "Roe v. Wade, supra, sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand." (410 U.S. at 189).

The primary thrust of Mr. Chief Justice Burger's concurring opinion in *Roe* v. *Wade* and *Doe* v. *Bolton* [45] was that the "right to decide to have an abortion" extension of the right to privacy is not absolute. He wrote:

> Of course, states must have broad power, within the limits indicated in the opinions, to regulate the subject of abortions, but where the consequences of state intervention are so severe, uncertainty must be avoided as much as possible. (410 U.S. at 208).

and:

> Plainly, the Court today rejects any claim that the Constitution requires abortion on demand. (410 U.S. at 208).

Mr. Justice Douglas, in his concurring opinions to *Roe* and *Doe,* classified the "right to decide to have an abortion" in his "third group" of constitutionally protected

[45] 410 U.S. at 208.

rights. This group involves "the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf." [46] Mr. Justice Douglas, however, also emphasized that "(t)hese rights, though fundamental, are likewise subject to regulation on a showing of compelling state interest." [47] Later in his concurring opinion, Mr. Justice Douglas, after concluding a "woman is free to make the basic decision whether to bear an unwanted child", [48] also noted that "such reasoning is only the beginning of the problem. The state has interests to protect". [49]

Mr. Justice Stewart, in his concurring opinion, also recognized that certain state interests are "legitimate objectives, amply sufficient to permit a state to regulate abortions more stringently or even to prohibit them in the late stages of pregnancy". [50]

Briefly stated, each justice who joined in this Honorable Court's opinion in *Roe* v. *Wade,* and each concurring justice explicitly recognized that the right of privacy, which, according to this Court, includes the abortion decision, is not absolute, but rather is subject to limitation. Furthermore, it is exceedingly clear that this Court and the concurring justices made considerable effort to emphasize this point.

[46] 410 U. S. at 213.

[47] 410 U.S. at 213.

[48] 410 U.S. at 214.

[49] 410 U.S. at 215.

[50] 410 U.S. at 170.

The issue before this Honorable Court, then, is whether the statutory provisions being challenged are protective of an important or "compelling" state interest and whether they are "narrowly drawn to express only the legitimate state interests at stake."[51]

The Important or Compelling State Interests Involved

In *Roe* v. *Wade* this Court explicitly recognized three state interests which would justify a limitation of the fundamental "right to decide to have an abortion": maternal health, medical standards and prenatal life. The Court made reference to these important state interests numerous times in the *Roe* decision. For example:

> . . . the right (of privacy), nonetheless is not absolute and is subject to some limitations; and at some point the state interests as to protection of health, medical standards and prenatal life become dominate. (Roe v. Wade, 410 U.S. at 155)
>
> As we have intimated above, it is reasonable and appropriate for a state to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. (Roe v. Wade, 410 U.S. at 159)
>
> We repeat, however, that the state does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, . . ., and that it has still *another* important and legitimate interest in protecting the potentiality of human life. (Roe v. Wade, 410 U.S. at 162)

Although in the *Roe* decision this Court explicitly mentioned only three state interests, *i.e.*, maternal health, medical standards, and prenatal life, which could justify regulating the right of privacy in the context of the abortion

[51] *Roe* v. *Wade*, 410 U.S. at 155.

decision, there are persuasive reasons to believe that those interests mentioned were never envisaged as exclusive. This becomes obvious when one considers the cases cited by this Court in *Roe* to support legitimate limitations on fundamental rights, the nature of the arguments made by the parties in *Roe*, several statements made by the Court in *Roe* and prior holdings of the Supreme Court concerning limitations on fundamental rights. For example, in support of the notion that fundamental rights may be limited by important state interests, the Court cited *Buck* v. *Bell*, 274 U.S. 200, *Kramer* v. *Union Free School District*, 395 U.S. 621, *Shapiro* v. *Thompson*, 394 U.S. 618, *Sherbert* v. *Verner*, 374 U.S. 398. In those cases, this Court recognized the following state interests as possibly justifying the regulation and limitation of fundamental rights: *Buck:* sterilization of feeble-minded persons in institutions, *Kramer:* possibility of restricting the franchise in school matters to those "primarily interested" (this Court did not resolve this issue), *Shapiro:* interest in preserving the fiscal integrity of its programs, *Sherbert:* possibility of controlling abuses of state unemployment compensation.

In *Roe*, the arguments made by the State of Texas were that the fetus is a "person" under the Fourteenth Amendment[52], that the State has recognized a compelling state interest in protecting prenatal life[53] and impliedly that the State has recognized a compelling interest in protecting maternal health. This latter argument was more particularly made by the State of Georgia in *Doe* v. *Bolton*.[54] The

[52] 410 U.S. at 156.

[53] 410 U.S. at 156, 159.

[54] See e.g. 410 U.S. at 187.

parties did not argue the existence of any other important state interests and, considering the nature of the criminal abortion statutes before this Court, no other state interests were apparently involved. In short, this Court was neither called upon nor did it consider any other possible state interests in its ruling in *Roe* and *Doe*.

The language of the Court's opinion in *Roe* further supports this. To again quote from *Roe*, "where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by *a 'compelling state interest.'*"[55] (Emphasis added).

This Court has recognized on numerous occasions the state's important interest in protecting the integrity of the family. For example, this Honorable Court has noted:

> Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. (Reynolds v. United States, 98 U.S. 145, at 165 (1878)).

> Marriage, as creating the most important relation in life, as having more to do with morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effect upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution. (Maynard v. Hill, 125 U.S. 190, at 205 (1888)).

[55] 410 U.S. at 155.

In *Estin* v. *Estin*, Mr. Justice Douglas, writing for this Court, noted:

> Marital status involves the regularity and integrity of the marriage relation. It affects the legitimacy of the offspring of marriage. It is the basis of criminal laws, as the bigamy proscution in Williams v. North Carolina dramatically illustrates. The state has a considerable interest in preventing bigamous marriages and in protecting the offspring of marriages from being bastardized. (Estin v. Estin, 334 U.S. 541 at 546 (1947)).

Although the context in which *Griswold* v. *Connecticut* arose was dissimilar to this case, this Court recently reemphasized the importance of the family relationship in *Griswold*, where it noted:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. (381 U.S. at 486).

The Point at which the State's Important Interests in Maternal Health, Prenatal Life and in the Family Become Compelling and Justify a Limitation on the Fundamental Right to Privacy.

Maternal Health

Concerning this Court's determination in *Roe* v. *Wade* that the "compelling" point with respect to the state's important and legitimate interest in the health of the mother "is at approximately the end of the first trimester"[56] it is

[56] *Roe* v. *Wade*, 410 U.S. at 163.

of considerable significance that this Court made this determination "because of the now-established medical fact, . . ., that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth"[57] What this court in effect concluded was that the State has a continual interest in maternal health, but because of "present medical knowledge", as viewed by this Court, concerning the above mentioned mortality rates in first trimester abortions and in natural childbirth, an anti-abortion statute which proscribes first trimester abortions in the name of maternal health is not reasonable. This results from what the court must have considered to have been a statistically unsound factual basis for an anti-abortion statute which precludes abortions in the first trimester. To be emphasized however is that this court reached its determination on the basis of its understanding "present medical knowledge" and its acceptance of a "now-established medical fact", not on the basis of any inherent or abstract aspect of the constitutional right of privacy. Therefore, in determining whether any of the constitutional provisions now under attack are constitutional, this Court, if it is to follow the method of analysis of *Roe,* must look carefully at the present state of medical knowledge concerning abortion and maternal health. The narrow issue is thus whether the statutory provision challenged is reasonably designed to protect the already acknowledged important state interest of maternal health.

Prenatal Life or Potential Life

"With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at via-

[57] *Roe* v. *Wade,* 410 U.S. at 163.

bility," concluded this Court in *Roe* v. *Wade.*[58] "This is so," explained this Court, "because the fetus then presumably has the capability of meaningful life outside the mother's womb."[59] (410 U.S. at 163). Several pages earlier in the *Roe* opinion, this Court wrote:

> Physicians and their scientific colleagues have regarded (quickening) with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable", that is, potentially able to live outside the mother's womb, albeit with artificial aid (citing Hellman & Pritchard, Williams Obstetrics 493, 14th ed. 1971) (Roe v. Wade, 410 U.S. at 160).

Here again, this Court determined the "compelling" point, not on the basis of any inherent or abstract aspect of the right to privacy, but rather on the basis of this Court's understanding of the state of present medical and scientific knowledge, the ultimate issue being the "capability of meaningful life outside the mother's womb"[60] or "potentially able to live outside the mother's womb, albeit with artificial aid"[61]. To be emphasized is that in *Roe,* the Court's methodology was to focus on the state of scientific knowledge in its determination of the "compelling" point. Thus, as scientific knowledge and medical technology advances, the point during gestation at which viability occurs may also change. If so, it necessarily fol-

[58] 410 U.S. at 163.

[59] 410 U.S. at 163.

[60] *Roe* v. *Wade,* 410 U.S. at 163.

[61] *Roe* v. *Wade,* 410 U.S. at 160.

lows that the "compelling" point for the state's protection of fetal life changes accordingly. This Court has thus construed the constitution in such a manner that the "compelling" point depends on a changing standard, upon the present state of scientific knowledge and medical technology. The issue, then, is whether the State of Missouri in protecting its important state interest in prenatal life has tailored its regulation in such a manner that it is not unreasonably related to its important state interests.

The Family

The state's important interest in regulating and protecting the family, long recognized by this Court, exists as long as the family entity exists. The narrow issue, then, is whether allowing a wife to make a unilateral decision of the magnitude of the abortion decision could be destructive of the family entity.

III.

THE STATUTORY DEFINITION OF VIABILITY IS AN APPROPRIATE STANDARD

The challenged Section 2(2) of the Missouri Statute defines viability as:

> "(T)hat stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems."

Appellant contends that this definition is constitutionally infirm under *Roe* and *Doe* because it contains a vague "standard of possible evanescent survival."[62] In addition,

[62] Appellant's Brief at p. 68.

they contend that *Roe* and *Doe* "must be interpreted to restrict the state's prohibition of abortion to that period of gestation, when by reasonable medical judgment, the fetus, if then born, has the probability of meaningful survival."[63] This is so, they argue, since the physician must first certify that the fetus is not viable or be subject to criminal penalties.

The court below held the definition constitutional and wisely concluded:

> "We do not think it is properly the function of the legislature or the courts to fix viability at an inflexible point in gestation. The time when viability is achieved will vary with each pregnancy, and the determination of whether a fetus is viable in a particular case must be left to the attending physician. Section 2(2) has precisely this effect."[64]

In short, the court below concluded that since viability was a question of fact dependent on the physician's use of his medical judgment, the state should wisely refrain from making statutorily precise that which was, in fact, not so. Such a conclusion is similar to the conclusion made by this Court in *U. S.* v. *Vuitch*[65] when it concluded that the standard "unless necessary for the preservation of the woman's life or health" was not unconstitutionally infirm for vagueness even though it was a statutory standard for criminal prosecution.

This Court's reasoning in *Vuitch* is appropriate here:

> "Indeed Webster's Dictionary, in accord with that common usage, properly defines health as 'the state

[63] Ibid.

[64] Slip Opinion at p. 8.

[65] 402 U.S. 62 (1971).

> of being sound in body or mind.' Viewed in this light, the term 'health' presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.
>
> We therefore hold that properly construed the District of Columbia abortion law is not unconstitutionally vague, and that the trial court erred in dismissing the indictments on that ground."[66]

Like the statute in *Vuitch*, the Missouri statute merely requires that the physician use his medical judgment to ascertain whether or not the fetus is viable. The use of his judgment is prescribed in terms familiar to any practitioner of the healing arts. He must so certify "with reasonable medical certainty." This is presumably the standard he exercises any time he makes any medical judgment. What then could make the use of that same judgment constitutionally infirm here?

Obviously nothing! So said the plaintiff-appellant, David Hall, M.D., in his testimony when he stated (Tr. 369) that he agreed with the statutory definition of viability even though it must be understood that it is a difficult state to assess. Because it is difficult, must the state be estopped from legislating? That would be a curious result. How could the state then legislate against driving while intoxicated since the state of intoxication has always been a difficult standard to apply? Indeed, how would the state regulate any activity which relied on judgment if appellant is correct?

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[66] Ibid. at p. 72.

Plaintiffs'-Appellants cite *Hodgson* v. *Anderson*,[67] *Doe* v. *Rampton* [68] and *Planned Parenthood* v. *Fitzpatrick*,[69] in support of their position. Such reliance is misplaced. In fact, *Hodgson* v. *Anderson* is contra to appellants position.

In *Hodgson* the statute under consideration was the Minnesota statute which defined viability as commencing at 20 weeks (which is not mentioned in appellants brief) and, in addition, created an area labeled "potentially viable" which seemed to the court to create a state interest in the fetus prior to actual viability. True, in discussing viability the *Hodgson* court did suggest that the lower statutory limit *if the statute contained such a limit* (which the Missouri statute does not) should not be below 24 weeks. This is so because the *Hodgson* court incorrectly assumed that under present technology it does not arise prior to 24 weeks.

But the *Hodgson* court itself agreed that the Missouri legislature's handling of the issue comported with *Roe* v. *Wade*:

> "It appears to this court that after reviewing the historical, medical, and legal attitude on abortions, the Supreme Court concluded that as between cases the point of viability will vary, and whether or not the fetus is in fact viable must be left to the medical judgment of the physician."[70]

When the *Hodgson* court complains about the legislative definition of viability, it is complaining about a statutory

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[67] 378 F. Supp. 1008 (D. Minn. 1974) appeal dismissed sub. nom. *Spannaus* v. *Hodgsson*, 420 U.S. 903 (1975).

[68] *Doe* v. *Rampton*, 366 F. Supp. 189. (D. Utah 1973).

[69] ..... F. Supp. ..... (E.D. Pa. 1975).

[70] Op. cit. Note 67 at p. 1016.

viability of 20 weeks which it incorrectly assumed was beyond the ability of modern medical technology (as we show later, even Dr. Hall, a plaintiff in this case agreed that 20 weeks was reasonable), and the creation of a highly ambiguous zone labeled "potentially viable" for which zone, it appeared to the court, the statute was seeking life saving potential.

Clearly *Hodgson* does not help appellants and is, in fact, contrary authority to their position.

Reliance on *Doe* v. *Rampton* is equally misplaced. There is no way that the Missouri definition of viability can be construed to be applicable in "any trimester." In addition, the *Doe* v. *Rampton* court's complaint was of an overall regulative scheme invading the first trimester also. Such is not a problem with the Missouri statute.

For some unknown reason appellants cites *Wolfe* v. *Schoering*[71] which is directly contrary to their position. The *Wolfe* court agrees that the decision as to when viability occurs "must be left to the professional medical judgment of the woman's physician just as in any other medical procedure."[72] Obviously there is no quarrel with what constitutes viability in its legal definition but only with a standard that would impose on the physician's judgment some determination as to when the *event* (of viability) occurs. This the Missouri statute does not do.

The Pennsylvania case is even more interesting.[73] There

[71] *Wolfe* v. *Schoering*, 388 F. Supp. 631 (W.D. Ky. 1974).

[72] Ibid. at p. 637.

[73] Op. cit. Note 69 Supra.

the court held that the standard set by *this court* in *Roe* v. *Wade* is constitutionally infirm for reason of vagueness. Again, as in *Hodgson* the court focused on certain words ("may be") in the statute which it felt attempted to create a state interest in fetal life prior to viability.[74] This the Missouri legislature did not do.

Indeed, as the court pointed out below, the use of the word "indefinitely" in the Missouri statute is a more restrictive definition of viability, not less restrictive as appellants seem to argue.[75]

Obviously the word "indefinitely" can be used in two senses neither of which create constitutional infirmity. On the one hand, it can refer to infinity which is clearly not applicable as even plaintiffs concede.[76] On the other hand, it can be interpreted to mean, as plaintiffs do, a measurement in breaths or heart beats.

This second usage is not constitutionally infirm, either. The statute requires merely that the physician use his best medical judgment to ascertain that the fetus is viable. He makes this clinical judgment based on the existence of a fetus en utero who is alive at *that time*. The length of time the fetus lives or will live ex utero is irrelevant if he has judged that the fetus is, in fact, while en utero and before

[74] Ibid. at p. 70 of the Slip Opinion as reproduced in the Jurisdictional Statement of Appellants which is on file before this court under the name *Beal* v. *Franklin*. The Pennsylvania 3 Judge Court labeled its section of the opinion concerning viability "Viability and Potential Viability", to indicate the nature of the problem as they saw it.

[75] Slip Opinion at p. 7.

[76] Appellant's Brief at p. 63.

the abortion is performed, viable. Thus "indefinite" merely means that the fetus he has judged to be viable is capable of indefinite life or life for some indeterminable period ex utero. By definition the fetus must be capable of life for some period or it is not viable to begin with. Rather than legislating in an area where it does not belong, (medical judgment) the Missouri Legislature has wisely, through the use of the word "indefinitely," left the matter to the judgment of the physician.

A common thread running through *Hodgson, Wolf,* the Pennsylvania case and appellant's brief is the complaint that the various state legislatures are not mandating a specific minimal age for viability at 24 weeks.[77] The answer to this is simple: the medical literature and, indeed, the opinions and evidence in the trial court below *do not support the idea that viability begins only at a minimum of 24 weeks.* In point of fact, as we will show hereafter viability commences prior to even 24 weeks.

The word "viability" can be understood in three ways:

1. Meaning alive;
2. Meaning capable of living outside of the womb with or without artificial aid;
3. Meaning able to survive the neo-natal period (28 days after birth).

There are several references to viability in *Roe* v. *Wade* decision. The two primarily concerning us appear at 410 U.S. p. 160 and 140 U.S. p. 164. We quote in full first the reference at 410 U.S. 164 for the reason that some courts have misread the case thinking that the pregnancy has been di-

[77] For example, in the Pennsylvania case, *Planned Parenthood* v. *Fitzpatrick,* ..... F.Supp. ..... (E.D. Pa. 1975) the court stated: "Indeed, if the statute had even limited viability to 24 weeks gestation, it would be in conformity with the pronouncement of Roe and not subject to a successful challenge."

vided into neat categories of trimesters, and that consequently some significant point of legal demarcation has been made at the end of the second trimester or at 24 weeks of gestation:

> "(a) For the stage prior to approximately the end of the *first* trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the *first* trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) *For the stage subsequent to viability,* the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." (Emphasis Added)

It is clear that the court has *not* indicated when viability occurs, but only that something important does occur at viability in terms of the State's right and interest in protecting fetal life. We should remember that, until it became a possible standard for the commencement of the civil right to life or at least the State's interest in protecting "potential life," the concept of viability had legal significance in the personal injury cases only, and that only since the tort action for prenatal injuries, conditioned on birth alive, was created by the Courts.[78]

[78] See cases listed in Annot, 15 A.L.R. 3d 992 (1967); Wrongful Death and the Stillborn Fetus—A Current Analysis, 7 Houst. L. Rev. 449 (1970); *Libbee* v. *Permanente Clinic,* (Or. Sup Ct) 518 P2d 636, 638 (1974).

Viability has been influenced by, and to some extent confused with, the concept of quickening, which was the point of origin for legal rights as far as Blackstone and most common law commentators were concerned.[79] In point of fact, to many judges there is no difference.[80] Quickening is a concept of maternal sensitivity indicating when the mother perceives, through physical activity such as movement or kicking, the presence of the developing child in her womb.

Quickening was an important evidentiary concept, especially after 1803 in England since after quickening abor-

[79] At the common law the unquickened fetus was not considered alive. In *4 Blackstone, Commentaries on the Laws of England* (concerning reprieves) 394-95 (1769) it is said: . . . "and if they bring in their verdict "quick with child" (for barely, "with child," unless it be alive in the womb is not sufficient)." In other words, "with child" was not sufficient to stay execution of a pregnant felon because the fetus was not considered to be alive; whereas "quick with child" was sufficient to stay execution since the fetus was alive and the law would not take the lives of two people where only one had committed the crime. Blackstone also said: "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb." 1 Blackstone 124 (1769).

[80] See concurring opinion of Justice Douglas where he seems to be equating the concepts of viability and quickening *Roe* v. *Wade* 410 U.S. at p. 220: "The protection of the fetus when it has acquired life is a legitimate concern of the state". At p. 215 he had stated: "While childbirth endangers the lives of some women, voluntary abortion at any time and place regardless of medical standards would impinge on a rightful concern of society. The woman's health is part of that concern; as is the life of the fetus after quickening." The difference is rather important since quickening can occur as early as 12-15 weeks.

tion was punishable by death, whereas prior to that the punishment was less severe.[81]

The factual question as to when the child en ventre sa mere becomes viable is unanswered in either *Roe* v. *Wade* or *Doe* v. *Bolton,* as well it should be since the record in those cases contained no evidence on that point, and viability can depend on a multitude of factual issues, including even race. Justice Blackmun, in dicta, did refer to viability as ". . . usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."[82] He supported this statement by reference to a medical text at Footnote 59 and Dorland's Medical Dictionary.[83] Dorland's does not refer to age and the exact quotation from the medical text places the lower end of the viability scale at 20 weeks (not 24 weeks) based on a single case:

> "Abortion is the termination of a pregnancy at any time before the fetus has attained a stage of viability. *Interpretations of the word 'viability' have varied between fetal weights of 400 g (about 20 weeks of gestation) and 1,000 g (about 28 weeks of gestation).* Since an infant reported by Monro that was said to weigh only 397 g survived, on the basis of this single precedent an infant weighing 400 g or more may be regarded as capable of living. Although our smallest surviving infant weighed 540 g at birth, survival even at 700 or 800 g is unusual. Attainment of a weight of 1,000 g is therefore widely used as the criterion of viability. Infants below this weight over 1,000 g have a substantial chance, which increases greatly with each

[81] See Byrne, Robert, "The Supreme Court on Abortion: An American Tragedy" Fordham L. Rev. 803 (1973).

[82] 410 U.S. at p. 160.

[83] Dorland's Illustrated Medical Dictionary 1689 (24th ed. 1965).

100 g increment. *Expert neonatal care, furthermore, has permitted survival of increasingly small infants.*" (Emphasis Added)[84]

Another standard medical dictionary defines viability as usually "... connotes a fetus that has reached 500 grams in weight or 20 gestational weeks".[85]

Returning again to the text cited by Justice Blackmun, we find:

> "This lower limit might logically be set at 400 g, because no fetus weighing less at birth has ever been known to survive. One fetus weighing 397 g on the second day of life, but doubtless slightly more than 400 g at birth, has survived, however, as reported by Monro. As shown in Figurel, a fetus weighing approximately 400 g has a gestational age of about 20 weeks. Convenience is another reason for adopting this figure, since nearly all state departments of vital statistics require the reporting of all births in which the period of gestation is in excess of 20 weeks. Twenty weeks, of course, marks the midpoint of the normal duration of human pregnancy, counting from the last menstrual period. A premature infant might therefore be defined as weighing between 400 and 2,500 g at birth. The round figure of 500—, however, has certain advantages as the definition of the limit between abortion and prematurity and is so employed elsewhere in this text."[86]

Another standard reference is the study by Schlesinger and Alloway of 436,254 live births in the New York De-

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[84] L. Hellman & J. Pritchard, *Williams Obstetrics,* 493 (14th ed. 1971).

[85] Stedman's Medical Dictionary 22nd ed. Williams & Wilkins Co.

[86] Op. cit. Note 84 at p. 1027.

partment of Health Records.[87] They reported 622 live births between *20 and 23 weeks gestation:*

436,254 Live Births in N.Y.
Surviving Neonatal Period, 28 days

Length of Gestation				
20-23 weeks,	8.2%	of these	(622 babies)	survived the neonatal period
24-27 weeks,	19.1%	of these	(1403 babies)	survived the neonatal period
28-31 weeks,	58.8%	of these	(2953 babies)	survived the neonatal period
32-35 weeks,	86.7%	of these	(7365 babies)	survived the neonatal period
35 weeks or older	99.2%	of these	(423,991 babies)	survived the neonatal period

Plaintiff-Appellants have cited[88] studies on viability which cleverly manipulate the statistics and even contradict their own testimony. Dr. Hall testified that beginning at 20 weeks a fetus has a chance for survival.[89] What plaintiffs want this court to do is determine as a matter of law that since only a few children born at 20-23 weeks have survived[90] then the law should exclude this period from its consideration—that, in fact, this court should declare as a matter of constitutional law that no state interest may exist in protecting fetal life before 24 weeks of gestation.

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[87] Pediatrics, Vol. 18, (1955); See also the study by Erhardt, C.L. et al "Influence of Weight and Gestation on Perinatal and Neonatal Mortality by Ethnic Group" Am. J. Pub. Health Vol. 54, pp. 1841-1855 (1964). This study shows conclusively that viability arrives earlier in the non-white races and their survival rate is greater.

[88] Appellants Brief p. 67.

[89] Transcript p. 369.

[90] Meaning survived 28 days after birth and went home from the hospital. 8.2% in the Schlesinger study so survived. The figures are higher in Erhardt's study.

The simple fact is that plenty of babies under 24 weeks have survived in the past as the above studies show and more will survive in the future. The state has an interest in protecting *each* of their lives and that interest cannot be vitiated because some or even a majority of children born before 24 weeks of gestation cannot survive. It would indeed be a cruel twist of fate for this court, the avowed protector of minority rights, to decree that the law may not protect the minority who can survive if born before 24 weeks merely because the majority cannot survive.

These reports of significant survival of tiny birthweight babies are not *unusual.* Reid, Ryan and Behirschke are authors of "Principles and Management of Human Reproduction.[91] The preface states, "This book which is dedicated to those who work toward the achievement of the initial right of man to be born without handicap and privilege of women to bear without injury", and the authors state:

> "At this age the normal fetus weighs approximately 500 grams, has a crown-to-rump (CR) length of 16.5 cm., and, at least occasionally, is capable of extra-uterine survival—it is then said to be 'viable'. Viability, though, is a changing concept. Medical advances in the treatment of the premature make it possible to anticipate that even these very small abortuses of 20 weeks' gestation may soon have a greater chance of survival and one surely does not then wish to describe a surviving fetus as an abortus."[92]

It should be pointed out that the word "viability" implies some inherent capability on the part of the child, but it equally applies to the present state of the medical art of keeping small babies alive. Immature and premature babies,

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[91] W. B. Saunders Co. (1972).

[92] Ibid. at p. 255.

if cared for, do better than ever before in history. For example, in their study Lubcheno, et al show that more and more children under 500 grams are being admitted to neonatal and perinatal hospital centers for the purpose of life-giving treatment.[93]

Viability can also mean alive even if only at these few moments under consideration. In their study, Pakter, et al report live births after abortions in 27 cases, 14 of which were between 17 to 20 weeks of gestation, 6 were between 21 to 24 weeks of gestation, and the remaining were older. These children were born alive after abortions and died later as a result of the abortion.[94] (See Appendex D)

Even considering the most severe definition, that of surviving the neonatal period, certain studies have shown survival at remarkably early ages with apparently little or no sequalae. One such study reports a case of a fetus born at a gestational age of 21 weeks *which survived and is still living,* and another of 22 weeks.[95] (See Appendix E) The literature contains numerous other reports of children born alive during the very early weeks of the second half of the gestation period who have survived and are living today.[96]

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[93] Lubchenko, et al "Neonatal Mortality Rates: Relations to Birth, Weight and Gestational Age", *Journal of Pediatrics,* Vol. 81, pp. 814-822 (1972).

[94] Pakter, et al, Clinical Ob. Gyn. Vol. 14 (1971) at p. 290. Their chart is reproduced in Appendix D.

[95] Alden et al "Morbidity and Mortality of Infants Weighing Less Than 1,000 Grams in an Intensive Care Nursery" *Journal of Pediatrics,* Vol. 50, No. 1 July 1972 pp. 40-48.

[96] Erhardt et al Op. cit. Note 87 Supra.

In *Planned Parenthood* v. *Fitzgerald*, Dr. Meklenburg, a Planned Parenthood Physician, testified as follows:

> "I would agree with that definition of viability. (Viability means capability of a fetus to live outside the woman's womb albeit with artificial aid . . .) I think that it has been current. I think it is a definition that takes into account medical progress, the fact that it is constantly changing. My perusal of the medical literature would lead me to believe that potential or continued life exists as early as 20 weeks—not in the current edition of Eastman's Obstetrics Book, but in the previous edition, the earliest report a survivor was reported as a delivery at 20 weeks gestation. In my own experience I have—the earliest survival that I have had is a patient who was 21 weeks from the time of conception or 23 weeks from the first day of her last menstrual period. The child is a year and a half old and normal."[97]

In the trial court below even one of the plaintiffs, Dr. David Hall, M.D., agreed (Tr. p. 369):

> "Q. Then in connection with the second trimester of pregnancy, is there a point at which it is possible that a fetus could survive?
>
> A. I think that after twenty (20) weeks, and, of course, I am getting back to my original point that has to do with viability; I think that after twenty (20) weeks of interuterine existence, then there is a possibility that the pregnancy could survive outside of the uterine environment prior to that point it is not."

In their study, Potter and Davis, using a weight of 400 grams ("this figure was selected because it appeared to be the average weight attained by a fetus at 20 weeks") as the low end of the viability spectrum, said:

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[97] Op. cit. Notes 69 and 74 at p. 67 of Jurisdictional Statement. The lower federal court reproduced Dr. Meklenberg's testimony in its opinion. Dr. Meklenberg's testimony is found on pp. 82, 83 of Trial Record.

> "Born alive were 101,398 over 2,500 grams with a survival of 99.5 per cent, 6,617—1,000 to 2,500 grams with a survival of 86.3 per cent and 463—400 to 1,000 grams with a survival of 6.4 per cent, a total of 98.4 per cent survival of all live-born infants over 400 grams."[98]

It is apparent from a review of this material that the medical literature accepts 20 weeks, or at almost exactly mid-term in the pregnancy, as the lower end of the viability spectrum speaking conservatively. By viability under these circumstances, and for these studies, means survival of the neonatal period, or 28 days after birth.

Further, it is also apparent that research in the area of neonatal intensive care will push viability further and further back in the years to come. The whole area of neonatal medicine is only 10 years old.[99] Research on the artificial placenta is in its embryonic state, and research into the chronic killer of the premature (underdevelopment of the lung structure) has had significant results in recent

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[98] Potter and Davis, "Perinatal Mortality at the Chicago Lying-In Hospital 1931-1966," American Journal of Obstetrics and Gynecology, Vol. 105, No. 3 Oct. 1, 1969 pp. 335-348 at p. 339.

[99] See: "Fetology: The Smallest Patients" *The Sciences*, The New York Academy of Sciences, Oct. 1968, Reprinted in Child and Family Quarterly, Vol. 8, No. 2, pp. 159-164, Box 508, Oak Park, IL 60303, where it was said:

> "Only a few years ago it was unthinkable that a human being might benefit from study and treatment before birth. The protective wall of pregnancy was inviolable, the pregnant uterus sacrosanct. But the unborn infant became a patient with the dawn of the new science of fetology, and his problems during intrauterine life are now a prime target of medical and surgical interest. Normal life before birth has also begun to yield its secrets to an impressive array of techniques for seeing, hearing, testing and monitoring the unborn child."

years.[100] We can expect that development of the artificial placenta will radically change our notions of the meaning of viability.[101] Medical research on the unborn has only just begun.[102]

In *Roe* v. *Wade* this Court was profoundly influenced by maternal mortality rates to the extent of invalidating all state legislation intruding into the first trimester because of the alleged safety of abortion.[103] We have argued above that viability should be considered a good possibility at 20 weeks. The argument from maternal mortality rates supports 20 weeks as a natural cut off point for viability since as Plaintiff-Appellants point out in their brief at that point maternal mortality for abortion *exceeds* maternal mortality for birth:

> "It should be noted that the mortality rate for abortions does not equal the rate for childbirth (using a conservatively low rate for the latter) until the 19th week of pregnancy gestation."[104]

One Court decision on the question clearly holds that 20 weeks can be established as the point of viability. In *Peo-*

[100] White, et al "Prolonged Respiratory Support in Newborn Infants With a Membrane Oxygenator" *Surgery,* Vol. 70, No. 2, pp. 288-296, August 1971.

[101] Alexander et al "Maintenance of Sheep Fetuses by an Extracorporeal Circuit for Periods up to 24 Hours" in Am. J. Obst. & Gyn. Vol. 102, No. 7 December 1, 1968, pp. 969-975.

[102] Hodari and Thomas "Experimental Surgical Procedures Upon the Fetus in Obstetric Research" *Obstetrics and Gynecology, Vol.* 34, No. 2 August 1969, pp. 204-211.

[103] 410 U.S. at p. 163.

[104] Appellant's Brief p. 26.

ple v. *Barksdale,*[105] the Supreme Court of California was squarely confronted with the question. In its opinion handed down late in 1972, approximately two months before *Roe* v. *Wade,* the Court said:

> "We have no doubt that the legislative intent was to require abortions to be performed within 20 weeks of the time of conception. We find further support for this analysis from the evidence before the Legislature that after 20 weeks there is a possibility that the fetus is viable and that an attempt to induce a premature delivery is a possible alternative to abortion when termination of pregnancy is a necessary medical concern . . .
>
> "Although we have refrained from determining whether the Legislature may establish any criteria limiting the decision to terminate a pregnancy during its earlier stages, we think it is unquestionable that such power exists, though nothing mandates its exercise, when the fetus is capable of life independent of the body of the woman. California law appears to be unique in establishing the twentieth week as the time for a changed legal relationship, but the present record in no way undermines the legislative determination that 20 weeks is an appropriate time for such a change."

Note that the California Supreme Court was unanimous in its decision on this point and that it declared several other sections of the statute unconstitutional. Note also that this Court is not known as a "conservative" court or one reluctant to establish new principles or make hard decisions.

In addition to sources already cited herein, other medical literature is consistent in stating the conclusion that twenty weeks is an appropriate time, at least for the present, at which to establish viability.

[105] 105 Cal. Rep. 20, 503 P 2d 276 (1972).

A statement on abortion by one hundred professors of obstetrics, strongly pro abortion in general, nevertheless says:

> "It should be emphasized that abortion is medically defined as the termination of pregnancy *before the end of the twentieth* week. Regardless of the wording of a particular state law, therefore, abortions should not be performed for purely social reasons beyond this gestational age. Every effort should be made, of course, to perform abortions before the end of the first trimester."

As can be determined in medical treatises an "abortion" and an "abortus" as used above are words used to describe the non-viable fetus.

In a paper printed on February 26, 1970 at the Symposium on the Functional Physiopathology of the Fetus and Neonate, by the Special Committee on Infant Mortality, Medical Society of the County of New York, there is presented at page 23 a table of "Fetal Dimensions at the Most Significant Periods of Fetal Development." The table describes by weeks four classes of gestational age and gives weight and dimensional criteria for judging such age. The four classes are:

> "Less than 20 nonviable,"
> "21 to 28 immature,"
> "24 to 36 premature,"
> "37 to 40 or more full term."

It also lists 500 grams as a weight indication of early viability.

Principles and Management of Human Reproduction contains the following statement:

> "For the purposes of this discussion an abortion is considered the termination of pregnancy before 20 weeks of gestation counting from the first day of the last menstrual period. It may be spontaneous or induced, the latter category being composed of what might be considered legal medical (therapeutic), and also criminal or illegal. As has been indicated, this is arbitrary but it does coincide with the definitions of many legislatures and has the merit of at least some medical justification. At this age the normal fetus weighs approximately 500 grams, has a crown-to-rump (CR) length of 16.5 cm., and, at least occasionally, is capable of extrauterine survival—it is then said to be "viable'. Viability, though, is a changing concept. Medical advances in the treatment of the premature make it possible to anticipate that even these very small abortuses of 20 weeks gestation may soon have a greater chance of survival and one surely does not then wish to describe a surviving fetus as an abortus."[106]

In "Resuscitation of the New Born Infant" (Third Edition, 1973) edited by Harold Abramson, M.D., emeritus professor of pediatrics of New York Medical College, Appendix I at page 384 is a guide for the study of perinatal mortality and morbidity. "Perinatal" means the first 28 days after birth. The Appendix instructs that, in order to get a proper statistical analysis "all deaths of fetuses weighing 501 grams or more (approximately 20 weeks gestation)" should be added to the deaths of new born infants to obtain proper mortality rates. This clearly implies that 20 weeks is the point of viability since infant deaths at that age should be included in infant mortality rates.

Twenty weeks is the line drawn for viability by the Advisory Group on the Use of Fetuses and Fetal Material for Research in its report to the Social Services Secretary of Great Britain in May of 1972. The report states: ". . . for ethical, medical and social reasons we recommend that for

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[106] Reid, Duncan E., M.D., Ryan, Kenneth J., M.D., Benurschke, Kurt, M.D. *Principles of Management of Human Reproduction*, W. B. Saunders Co., 1972 at pp. 254-255.

human fetuses, evidence of a period of gestation of 20 weeks should be regarded as prima facie proof of viability at the present time". The now controversial guidelines of the Human Embryology and Study Section of the National Institutes of Health, relating to the use of human fetuses for experimental purposes, also has urged that the line be drawn at 20 weeks. For years state legislatures have used 20 weeks as the point at which death certificates must be filed in the case of neonatal deaths.[107]

Finally we turn to some additional statistical analysis supporting these conclusions. The most thorough study is now probably outdated by medical advances since it was based on live births and deaths, recorded in the Office of Vital Statistics of the New York Department of Health, for New York State exclusive of New York City in the years 1949, 1950 and 1951. It was made by Schelsinger and Alloway and published in Volume 15 of Pediatrics, the official publication of the American Academy of Pediatrics. It showed 622 live births with a gestational age of between 20 and 23 weeks and an 8.2% survival rate for these births.

Another study by S. G. Kohl summarized on p. 680 of Williams Obstetrics, shows a survival rate of 4.1% of fe-

[107] E.G. see Ill. Rev. Stats. Ch 111½ Sec. 73-20. In fact, U.S. Public Health Service guidelines state:

> "Important: If a child breathes or shows any other evidence of life after complete birth, *even though it be only momentary,* the birth should be registered as a live birth and a death certificate also should be filed." (emphasis added) U.S. Dept. of H.E.W., Public Service Bulletin No. 593, 1958.

This is consistent with the typical state statute such as Illinois which defines a "live birth" as "the complete expulsion or extraction from its mother of a product of human conception, irrespective of duration of pregnancy, which after such separation breathes, or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles. . ."

tuses born weighing 401 to 1,000 grams (something less than 20 weeks to about 27 weeks).

A review of the testimony in the case and the medical literature on the subject shows rather clearly that viability cannot be defined as a static concept in term of weeks. Indeed, in each case the judgment of when viability occurs is a medical judgment which the physician determines on the same basis on which he makes any medical judgment—a reasonable medical certainty. Appropriately, the Missouri statute has left the matter to the judgment of the physician. And, as this court indicated in the *Vuitch* case, this standard is not only not constitutionally infirm for vagueness, it is uniquely appropriate to the "judgment that physicians are obviously called upon to make routinely whenever surgery is considered."[108]

Developing tort law also teaches us much about the significance of viability. As to the action for wrongful death resulting from negligent injuries to the unborn, the situation on a national basis was complicated by the varying provisions of the states' wrongful death statutes. However, at the time that the *Roe* v. *Wade* case was decided there was a distinct majority in favor of allowing such an action.[109] The Supreme Court in *Roe* v. *Wade* paid scant attention to these authorities and dismissed them with the statement that they represented only a vindication of the parents' rights. As Professor Ely says:

> "To the extent that they are not entirely inconclusive, the bodies of doctrine to which the court adverts respecting the protection of fetuses under general legal

[108] 402 U.S. at p. 72.

[109] 15 A.L.R. 3rd 992 (1967); "Wrongful Death and the Stillborn Fetus—A current analysis" 7 Houst. L. Rev. 449 (1970).

doctrine tend to undercut rather than support its conclusion."[110]

As though in agreement with Professor Ely's conclusion, since *Roe* v. *Wade* four State Supreme Courts have specifically created a cause of action for the wrongful death of a viable unborn child in their respective jurisdiction.[111]

The Supreme Court of Oregon, in the case of *Libbee* v. *Permanente Clinic,* held that the word "person" in its constitution included a viable but unborn child for purposes of maintaining a wrongful death action. The Court pointed out that since 1949 the Courts of 19 jurisdictions expressly permit an action for the death of a viable unborn child, whereas only 12 jurisdictions expressly prohibit such actions. As to the argument that an unborn child has no judicial existence apart from its mother, the Court stated:

> "It is now recognized that there is no medical or scientific basis for such a proposition and it was expressly rejected by this Court in *Mallison,* at least with respect to a viable unborn child."[112]

The Court pointed out that the decision in *Roe* v. *Wade* was consistent with its previous decision in *Mallison* to the effect that a viable child is a "person" entitled to the protection of Article 1, Section 10 of the Constitution of Oregon.

In *Mone* v. *Greyhound,* the Massachusetts Supreme Court reversed its own 1972 decision of *Leccese* v. *McDonough,* and held that "a fetus is a person for purposes of our wrongful death statute". The Court stated:

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[110] Ely, Op, cit., Note 8 Supra at p. 925.

[111] *Chrisofogeorgis* v. *Brandenberg,* 55 Ill. 2d 368, 304 N.E. 2d 88 (1973); *Libbee* v. *Permanente Clinic,* (Or.), 518 P.2d 636 (1974); *Eich* v. *The Town of Gulf Shores,* (Ala.), 300 S.2d 354 (1974); *Mone* v. *Greyhound,* (Mass.), ... N.E.2d ..... (1975).

[112] 518 P.2d at 640.

> "It can no longer be said with any degree of accuracy that the majority view allows a right of action only where injury is followed by live birth. In fact, a clear majority of jurisdictions having considered the question have chosen viability over live birth as the determinative factor for deciding whether a right of action for wrongful death will be allowed. A careful examination of the cases from other jurisdictions reveals that substantial precedent exists to support the viability rule."[113]

The majority concluded:

> "In view of our present analysis of *Leccese,* we can find neither reason nor logic in choosing live birth over viability for the purposes of interpreting our wrongful death statute. We agree with the majority of jurisdictions that conditioning a right of action on whether a fatally injured child is born dead or alive is not only an artificial and unreasonable demarcation, but is unjust as well."[114]

It is frequently argued that these cases do not represent a legal right in the child itself, but only vindication of the right of the parents or of the survivor. This argument is clearly erroneous since in order for the action to exist the unborn child must be found to be a "person" within the meaning of that word as used in the wrongful death statute. Once the Court has so found, then the right which accrues to the unborn child is identical to the right which accrues to any adult for whom the same cause of action might exist. Whether one labels that cause of action as vindication of the rights of survivors merely indicates the side which the viewer is taking of the abortion issue. The conclusion is inescapable: The unborn viable child is a bearer

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[113] ..... Mass. ....., N.E.2d (1975).

[114] Ibid.

in its own right of legal personhood for purposes of the wrongful death cause of action. This proposition, clearly the majority point of view in America, indicates that legal personhood and probably, someday again, constitutional personhood will begin en ventre sa mere, as it does in Oregon.

The argument is additionally erroneous because viability is a concept which concerns the developmental qualities of the unborn child itself in terms of its capacity to sustain its own life outside the womb. It would be totally unnecessary to consider viability at all if the action was merely to vindicate the parent. Indeed, it would be contradictory to do so, since the parent presumably wants the child, indeed loves the child, one week before viability as much as one week after.

IV.

SECTION 6(1) IS A REASONABLE REGULATION OF PHYSICIAN'S AND A REASONABLE EXERCISE OF STATE'S INTEREST IN FETAL LIFE. IT IS NEITHER VAGUE NOR OVERBROAD.

Section 6(1) of the Missouri statute was held unconstitutional by the court below and its enforcement enjoined. This section reads in part:

> "No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted."

The attorney general of Missouri argued that Section 6(1) of House Bill 1211, if correctly interpreted, would refer only to a time *after* the pregnancy had been terminated. Representative O'Toole, the sponsor of House Bill

No. 1211 in the Missouri General Assembly, testified that Section 6(1) was intended to preserve fetal health *after* the abortion was completed. Materials were distributed to various committees and members of the Missouri General Assembly describing the things that had been done to fetuses born alive as the result of an abortion. In order to prevent such occurrences in Missouri, it was the intent of the General Assembly to adopt a standard of care applicable to preservation of a fetus after its abortion. Such an interpretation would not contravene or infringe upon any right afforded by the state or U.S. Constitution to any pregnant woman desiring to have an abortion.

Once the fetus is aborted alive, the physician must then exercise the standard of care set out in Sec. 6(1). If Missouri can regulate abortion in the interest of maternal health beginning at approximately the end of the first trimester; and if it may proscribe abortion after viability except when abortion is necessary to preserve the health or life of the mother; it is only logical that the state has an interest in the protection of a fetus born alive.

A fetus born alive is a postnatal being and thus must certainly fall within the scope of Fourteenth Amendment "personhood".[115]

> "Born alive as ordinarily understood, and in fact, means 'brought forth' into life or existence, and a child is completely born when delivered or expelled from and becomes external of the mother."[116]

Since a born alive fetus is surely considered a "constitutional person", the statutory provision in effect exacts standards of medical care which are already existent.

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[115] Cf. *Roe* v. *Wade*, 410 U.S. at pp. 156-157.

[116] *State of Missouri* v. *Phason*, 406 S.W.2d 671, 690 (1966); *Goff* v. *Anderson*, 91 Ky. 303, 15 S.W. 866 (1891).

Plaintiffs argue that Section 6(1) prescribes the standard of care which a person performing any abortion must exercise for the protection of the "fetus", without reference to any particular stage of pregnancy and without reference to birth alive. Defendants argue that the proper construction to be given this section is that it requires attending medical personnel to take positive action only subsequent to an abortion in the event the fetus is alive. In addition to the legislative history, the statute as a whole supports this interpretation. Section 6(1) appears directly after that section of the statute (Section 5) dealing with viability. The following section (6(2)) concerns birth alive as does 6(3).

It is apparent that in its proper context Section 6(1) deals with a live born fetus. One cannot argue against the logic of Plaintiff's position that abortions "are intended to produce the death of the fetus." (Brief p. 108).

The issue here is, however, what is the applicable standard of care for the physician when the "purpose" of the abortion fails and the fetus lives? That such unforseen events are not altogether rare is clear from the Boston trial of Dr. Edelin and from the medical literature on the subject. (See Appendix D). Indeed, the problem is a recurrent one with every mid-trimester abortion.

One might argue that the physician's duty to a live born fetus is clear: he must treat the infant as his oath as a physician directs him to do with all his patients. That the standard is not clear is evident from the trial of Dr. Edelin as well as from the argument in Plaintiff's brief that since the purpose of abortion is the death of the fetus, the physician has no duty towards a live born infant who may not be viable in the strictest use of that word: able to survive the neonatal period (28 days) and go home from the hospital. (Appellant's Brief p. 68).

The Missouri legislature intended by Section 6(1) that every live born infant be considered viable in the sense that that word also means living. Any other interpretation would mean that infants live born as a result of abortion could be deliberately killed. There is no question that a grey area exists in the law. On the one hand, the state's interest in potential life according to *Roe* v. *Wade* begins at viability. On the other hand, infants are surviving abortions who are well under 24 weeks of gestational age.

In Appendix D we have supplied the court with a list of live births after saline as reported by Pakter et al. in *Clinical Ob. Gyn.* Twenty-seven cases are listed in a 6 month period shortly after abortion was legalized in New York. The gestational ages vary from a low of 16 weeks to a high of 30 weeks. Fourteen of the fetus' were 21 weeks in gestation *or under.* One of the infants survived (#5) and according to press reports was adopted. It should be emphasized that all but 3 of the infants in this study survived *after* undergoing the rigors of saline abortion.

The length of survival varies from five minutes (#14) to 53 hours (#12) to still alive (#5). Can the state assert an interest in these live born fetuses (infants)? *Roe* v. *Wade* did not consider this issue. There the court only spoke of viability in terms of the state's interest before the abortion procedure was commenced. The court has yet to face this extremely difficult and sensitive issue. May the state assert an interest in a live born fetus? Surely common sense says yes otherwise the court would be legalizing infanticide.

The United States District Court below concluded that the language of the first sentence of Section 6(1) was unconstitutionally overbroad for failure to exclude the stage of pregnancy prior to viability.

It is anomalous that the District Court should have reached such a decision in light of the evidence of legislative intent introduced in the evidentiary hearings by Representative O'Toole, the Sponsor of House Bill No. 1211. Mr. O'Toole testified that the purpose of Section 6(1) was to preserve fetal life after the abortion was completed. Once the fetus becomes viable or is born alive the state has a "compelling" interest in the protection of human life.[117] Section 6(1) read as a whole as it ought to be, strives to do just that—"protection of human life".

The problem as seen by the United States District Court is to a large degree semantical. The first sentence of 6(1) uses the terms "life" and "fetus" while the second sentence uses the terms "life of the child" and "child". The District Court interpreted "fetus" in Section 6(1) to mean a non-viable fetus. It is clear that the court did not understand nor face the issue which now faces this court.

The second sentence merely uses the word "child" for the obvious reason that once the fetus is live born it is now a child not a fetus. Far from creating confusion the use of the word "child" in the second sentence clarifies the intent of the first by showing for whose benefit the physician must exercise his care and skill: the live born fetus now a child. The United States District court for the Eastern Division erred in narrowly interpreting the word "fetus" in the first sentence of Section 6(1) and by failing to consider the specific nature of the problem in order to preserve the statute. Construing the first sentence in such a manner that it refers to a period prior to live birth is

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[117] 410 U.S. at pp. 156-157.

[118-123] These footnotes have been omitted.

not consonant with the legislative desire behind Section 6(1). Section 6(1) was intended to effectuate a legitimate state interest—protection of live born infants, specifically those who have survived abortions. Section 6(1) does not in any way affect a woman's right to an abortion or a physician's right to practice medicine; the aim of the statute is to protect children who have survived an abortion procedure.

V.

REQUIRING THE PATIENT'S WRITTEN, INFORMED CONSENT IS NECESSARY AND PROPER

Plaintiff-appellants argue that the informed consent requirement of the Missouri statute, in addition to being an unconstitutional intrusion on their First Amendment right to practice medicine, is unconstitutionally vague through its use of "informed" as describing the required consent. Plaintiffs complain that the section 3(2) fails to specify the nature of the information required to be given by a patient before her consent may be considered informed (Pl. Br. 72).

The word "inform" is defined in Webster's New Twentieth Century Dictionary (1950) as "to instruct, to communicate knowledge to, to make known to." "Consent" has been legally defined as a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice to do something proposed by another.[124] In the case of *Heine* v. *Wright*[125], it was said that "consent is implied in every agreement. It is an act unclouded by fraud, duress, or sometimes even mistake."

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[124] *People* v. *Kangiesser*, 44 Cal.App. 345, 186 P. 388, 389.

[125] 76 Cal.App. 338, 244 P. 955, 956.

Thus it is clear that the word "informed" in section 3(2) of the Missouri statute, as well as the words "freely given" and "not the result of coercion" are all elements of the legal definitions of consent. As such, the words "informed", "freely given" and "not the result of coercion" in the statute may be considered as mere surplusage.

Concerning what specific information is required to be imported by the doctor to the woman considering an abortion the Supreme Court in *Roe* v. *Wade* is a specific guide, and obviates plaintiffs objections of vagueness as to what information is to be imparted, namely:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician *necessarily* will consider in consultation. [126]

In deciding that a woman had a right to privacy within the Fourteenth Amendment's concept of personal liberty broad enough to encompass a woman's decision whether or not to terminate her pregnancy, the court specifically rejected the argument that the right to an abortion is absolute:

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[126] 410 U.S. at p. 153.

> We therefore conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation. [127]

Since the right to an abortion is a fundamental albeit limited right, state regulations limiting it may be justified only by a "compelling state interest". Legislative enactments concerning it must be narrowly drawn to express only the legitimate state interest at stake. The only compelling state interests considered by the United States Supreme Court in *Roe* v. *Wade* were relative maternal mortality rates as between abortion and childbirth in the first trimester, the woman's health and safety when an abortion is proposed at a later stage in pregnancy, and the state's interest in protecting prenatal life: "it is these interests, and the weight to be attached to them, that this case is concerned." [128]

The question then as to the informed consent provision of the Missouri statute is whether the state has a compelling interest sufficient to justify a regulation to assure that the decision is informed, and if it does, whether this enactment is drawn narrowly enough to express only the legitimate state interests at stake.

Testimony was offered by witnesses for both the plaintiffs and defendants in the court below which showed that the state indeed had compelling interests sufficient to support legislation requiring informed consent at all stages of pregnancy since the physicians are deliberately ignoring their duty to do so.

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[127] 410 U.S. at p. 154.

[128] 410 U.S. at p. 152.

The evidence showed that there was little or no consultation by the doctor with the woman prior to her decision to abort concerning the factors the Supreme Court held should be necessarily considered, such as "specific and direct harm medically diagnosable even in early pregnancy," or "psychological harm." These factors, the evidence established, were not discussed at all, much less in a context, as the court's ruling suggests, of the doctor giving the woman reasons why the woman should or should not have an abortion.

It was clear from the cross-examination of one of the defendant's witnesses, Dr. Gerald Anderson who had performed approximately 2050 first trimester and 200 second trimester abortions at the Yale-New Haven Hospital in the past year (Tr. 306), that he considered himself a technician primarily. Dr. Anderson testified that he saw about 500 of the 2050 patients he had aborted personally prior to performing an abortion of them (Tr. 350). He obtained a written consent for the sole reason of protecting himself from civil liability (Tr. 353), and not to assure himself, as the Supreme Court contemplated, that the woman's consent was informed.

Dr. James C. Warren, an obstrician and gynecologist on the staff of Barnes Hospital testified for the plaintiffs that he too required written consent of his patients for surgical procedures. They certified their consent was informed. This was the case even prior to June 15th, the effective date of the Missouri statute. He testified that he generally talked first with the women upon whom he performed abortions and that abortion is "a stressful decision".

On cross-examination Dr. Warren testified that morbidity rates were insignificant to him as compared to mortality rates (Tr. 48). This attitude on the part of Dr. Warren

suggests that subsequent sterility or subsequent premature births his patients risk incurring as a result of abortion are inconsequential to him, too, so that he wouldn't advise them of such possible "specific harm medically diagnosable."

Mr. Peter Davis, president of the board of directors of the plaintiff organization, Planned Parenthood of Central Missouri, testified for the plaintiff on direct that if a woman who comes to their facility is certified to be pregnant, she is seen by a counsellor. The counsellor may or may not be a professionally trained counsellor, she may be only a volunteer. None of the counsellors are physicians. Most of their training is "experience" (Tr. 148).

Mr. Davis testified that the counselling aspect of the entire procedure is performed by somebody other than Dr. Pearman, the physician performing the abortions (Tr. 139).

Judith Widdecomb, executive director of Reproductive Health Services, Inc., an organization that had provided five thousand six hundred and twenty first trimester abortions in the preceding twelve months, testified for plaintiffs that their service provides counselling for women with problem pregnancies "as to the options and services available."

Dr. Matthias Backer an obstetrician and gynecologist practicing in St. Louis, Missouri testified for defendants that in his practice he treats infertility problems frequently. He has concluded that women who have had a previous induced abortion are at much greater risk of developing infertility subsequent to the abortion and as a result of the abortion. In these cases, the abortion created infection resulting in tubal occlusion or blocked tubes. He had also noted cervical incompetency in the case of pregnant women

who had previous induced abortions. The cervical incompetency resulted in delivery of immature and premature infants in subsequent pregnancies. Early delivery affects the central nervous system of the child. It may cause epilepsy, cerebral palsy, spasticity and mental retardation.

Dr. Backer testified that the observations he had made concerning the relation between a prior induced abortion and subsequent sterility or delivery of premature possibly handicapped infants in a subsequent pregnancy were confirmed by his readings of medical literature.

One report, the green journal of October 1972, was that the incidence of premature labor and still births occurred in pregnant women who had previous induced abortions twice as frequently as it did in pregnant women who had not had prior induced abortions.

There is also a higher incidence of other obstetrical complications including placenta praevia, abruptio placentae, premature separation of normally implanted placenta and of prolonged labor in addition to the less common but also serious problems such as iso-immunization of the mother to the ABO factor, for which there exists no preventative today (Tr. 219-223). Dr. Backer related cervical incompetency to abortion procedures involving vigorous dilatation of the cervix which would include procedures used within the first trimester of pregnancy.

In upholding the informed consent section (3(2)) of the Missouri statute, the court below relied on the holding in *Roe* v. *Wade,* in which the Supreme Court enumerated some of the factors, medical and psychological, concerning which the woman and her physician would necessarily consider in consultation prior to making the abortion decision. The court below also relied on the evidence, offered by both the plaintiffs' and defendants' witnesses, that the abortion decision is a stressful one at best, which requires consultation. Requiring written consent, the court below noted, is a common practice of physicians and requiring it for the abortion procedure simply includes it within the category of medical operations for which consent is required.

Plaintiffs, two physicians and an abortion facility, attack the consent requirements of the statute not only on their own behalf. They purport to attack the consent requirements on behalf of their absent women patients too. This they do even though the typical case where a person or a woman was alleging a lack of informed consent, the action would be against such a physician, i.e. the consent provisions are clearly devised as a protection for the woman or girl as against her physician or abortion facility. A preliminary consideration for this Honorable Court's ruling should be the propriety of a class action in which the interests a class asserts on behalf of a member of another class are possibly adverse.

Plaintiffs assert as to the consent provisions of the statute challenged by them, that state can show no compelling interest that would possibly intrude on their First Amendment rights to practice medicine according to their best medical judgments. Plaintiffs are offended by the criminal sanctions that might befall them if they should violate this criminal statute.

But such assertions of absolute First Amendment protection ignore the regulations imposed by the United States Supreme Court in *Roe* v. *Wade* and allowed there as permissible state criminal regulations imposed on their right to practice medicine. Under *Roe* for instance, a state

may constitutionally require, under penalty of criminal law that the physician-abortionist be licensed. The state may require under criminal penalty that the physician be licensed within the state in which he is performing abortions. It may require, possibly contrary to the individual physician's best medical judgment, that for the period just subsequent to the end of the first trimester, that abortions be performed in a hospital or clinic, and that the facility be licensed or regulated in ways that are reasonably regulated to maternal health.

The state may also require, under sanction of criminal law, that for the stage subsequent to viability, no abortion may be performed except where it is necessary to preserve the life or health of the mother. [129]

In addition to the above regulations which the Supreme Court held may be criminally proscribed, the court addressed itself to specific items about which the doctor would necessarily consult with a woman contemplating abortion, prior to her decision to abort or not and prior to the physician's independent decision as to whether he should abort her or not in his best clinical judgment.

In enunciating some of the factors *the doctor* will *necessarily* consider in consultation with the woman contemplating an abortion, the court further regulated the physician's right to practice medicine in a way he might see fit. Thus it may be seen that *Roe* v. *Wade* teaches that right to practice medicine, just as any other right, is a limited one at best.

The testimony in this case makes it abundantly clear that the statutory requirement for an informed consent is both

[129] 410 U.S. at pp. 164-165.

necessary and proper. The standards are not vague nor do they unconstitutionally intrude into the physician's right to practice medicine.

VI.

THE PARENTAL CONSENT REQUIREMENT IS PROPER

The requirement of parental consent in the Missouri statute not only protects the minor daughter from the effects of her immaturity, but it safeguards the right and duty of a parent to protect the daughter from her immaturity, and safeguards the concepts of parental authority and its basis, parental responsibility for the daughter's nurture, care and education.

The parent's duty is spelled out in a recent Arizona Supreme Court juvenile action, *In re Appeal in Maricopa County,*[130] where the court reasoned, ". . . children are not property of their parents . . . on the contrary . . . children as persons have special needs and rights which are protected by law. One of those rights is the right of proper and effective parental control and care." The parent's right and duty to control the child is based on, and is therefore limited by, the child's need, so that in *Prince* v. *Massachusetts,*[131] even the precious First Amendment right of the parent to free exercise of her religion yields to the state statute protecting the minor's welfare. This court links the child's well-being with the interest of the state to justify intrusion into the family relationship: "It is the interest of youth itself, and of the whole community, that

[130] 111 Ariz. 588, 536 P.2d 197 (1975).

[131] 321 U.S. 158, 64 S.Ct. 438 (1944).

children be both safeguarded from abuses and given opportunities for growth . . .''[132] Other parents' rights cases hold that the parents prevail over state interests where the state fails to show a sufficiently weighty justification to upset the autonomy of the family. For example, *Pierce* v. *Society of Sisters,*[133] announces that ''those who nurture [the child] and direct his destiny have the right coupled with the high duty, to recognize and prepare him for additional obligations,'' such obligations being in this case those presented in the course of the exercise of religious belief. Finally the Court in *Ginsberg* v. *New York,*[134] not only shields the family from unwarranted interference but holds that ''the legislature could properly conclude that parents . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.''[135] Throughout these cases, whatever the specific outcome, the pivotal consideration is the welfare of the minor.

Plaintiff-appellants cite the study showing that teenage pregnancies have a greater risk of death and medical complications than pregnancies of older women. The study also shows that the medical risk to minors is greater than it is for older women for abortions sought at any stage of pregnancy.[136] In view of the greater medical risk whatever

[132] 321 U.S. at 165.

[133] 268 U.S. 510, 535 (1925).

[134] 390 U.S. 629 (1968).

[135] Justice Stewart concurring, 390 U.S. at 639.

[136] Legalized Abortion and the Public Health Institute of Medicine: National Academy of Sciences, Washington, D.C.: 1975 at p. 62.

the minor's choice ultimately is, parental responsibility for the consequences of the daughter's choice requires, in the interests of parental due process, a right of the parent to participate in the difficult decision.

The testimony at trial indicated that counselling provided at an abortion referral agency might take one or two hours. The decision was described as a ''crisis'' situation. Whatever the responsibility felt by the counselor, who may be a volunteer and whose training may only be ''experience'', one or even two hours of counselling falls far short of the parental duty and responsibility for the physical and psychological care of the child extending over a period of years until majority.

There is no doubt that legal rights of children have been extended recently, particularly in the area of due process for delinquency proceedings. The cornerstone case, *In re Gault,*[137] assures safeguards to the minor substantially equivalent to those given adult defendants. *Gault* severely criticizes the working out of the juvenile correction concept as eroding due process rights of minors under the guise of removing minors from the harsh imputation of criminal responsibility in adult criminal process. Even *Gault,* though, in its provision that notice be made to ''a child *and his parents*'',[138] and that the competency of a parent could supplement a child's deficiency in, e.g., waiver of the right of self incrimination, assumes the identity of interest between parent and child, and the parental responsibility to substitute his judgment for that of the child. This is consonant with *McKiever* v. *Pennsylvania,*[139] which

[137] 387 U.S. 1, 87 S.Ct. 1428 (1967).

[138] Ibid. at p. .....

[139] 403 U.S. 528, 545, 91 S.Ct. 1976, 1986 (1971).

refrains from "a flat holding that all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding," using "fundamental fairness" as the standard. Such fairness under the juvenile court concept involves providing the child support and guidance, and not in leaving him to his own resources. Justice Stewart, concurring in *Ginsberg, supra,* argues that

> in some precisely delineated areas a child . . . is not possessed of that full capacity for individual choice which is the presumption of First Amendment guarantees. It is only on such a premise, I should suppose, that a state may deprive children of other rights—the right to marry, for example, or to vote—deprivations that would be constitutionally intolerable for adults.[140]

Justice Goldberg, concurring in *Griswold* v. *Connecticut,*[141] recognizes the right to marital privacy and to marry and raise a family as being "of similar order and magnitude as the fundamental rights specifically protected" in the Bill of Rights. He goes on to state that the Government has no right to disrupt "the traditional relation of the family—a relation as old and as fundamental as our entire civilization." The *Griswold*-based right of privacy was extended in *Eisenstadt* v. *Baird,*[142] to apply to individuals irrespective of the family relation, and as such was applied in *Roe* v. *Wade.* However, these extensions in no way diminish the vitality of the family privacy and autonomy protected in *Griswold,* where Justice Goldberg called it a liberty "so rooted in the traditions and conscience of our people as to be ranked as fundamental" [citing *Snyder* v. *Massachusetts,* 291 U.S. 97, 105, 54 S.Ct. 330, 333 (1934)]. The right to choose abortion, though "fundamental" according to *Roe,* is not so rooted in tradition and conscience, but rather is, as formulated by Justice Douglas in the majority opinion in *Griswold,*[143] a "penumbra, formed by emanations from the [specific Bill of Rights] guarantees . . . " Whether this distinction is of consequence in weighing the merits of the two basic rights is unclear. At any rate, *Roe* v. *Wade,* holds, following the standard of *Griswold* and *Kramer* v. *Union School District,*[144] the latter concerned with voter qualifications, that a "compelling state interest" must exist in order to limit the fundamental right to an abortion.[145] The very right at issue in *Kramer, supra,* and that upheld in *Tinker* v. *Des Moines,*[146] have in other circumstances been curtailed because of minority. *Ginsberg* affirmed the "right of parents to deal with the morals of their children as they see fit",[147] as this right bore on the child's First Amendment right to buy and use obscene literature. Every state has age qualifications restricting the fundamental right to vote, as noted in *Ginsberg, supra,* and even the right to marry, "one of the vital personal rights essential to the orderly pursuit of happiness by free men" *Loving* v. *Vir-*

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[140] 390 U.S. at 649.

[141] 381 U.S. 479, 496, 85 S.Ct. 1678, 1688 (1965).

[142] 405 U.S. 438, 92 S.Ct. 1029 (1972).

[143] 381 U.S. at 484.

[144] 395 U.S. 621 (1969).

[145] 410 U.S. at 155.

[146] 393 U.S. 503, 89 S.Ct. 733 (1969).

[147] 390 U.S. at 639.

gina,[148] is denied to minors in all states, subject to parental consent. It is respectfully submitted for the court's consideration that if it holds that an unmarried minor has the right to consent to an abortion without parental consent, that most if not all of the other legislation passed, supposedly for the welfare of the minor, to protect the minor from the possible effects of her immaturity will become constitutionally suspect, including the state's right to require parental consent for the marriage of a minor, to legislate against the distribution or exhibition of obscene materials or literature to minors, or to prohibit the sale of liquor or tobacco to minors. Legislation making contracts voidable when a minor is a contracting party will also be of questionable constitutionality. These fundamental rights, which have been conditioned as they apply to minors, are to be distinguished from the rights to fairness and due process protected in *In re Gault, supra,* and *In re Winship,*[149] which are accorded a minor regardless of his level of competence. The rights subject to parental consent or otherwise conditioned in their application to a minor have this in common, that they require exercise of judgment and personal decision-making on the part of the person exercising the right. It is precisely here, in relation to the abortion option, that the parents' duty and the minor daughter's need coincide, in the requirement for parental consent. Judge Julian, dissenting in *Baird* v. *Bellotti,*[150] considers the "possibility that the abortion might have been adverse to [the minor's] best interests . . ." and con-

[148] 388 U.S. 1, 87 S.Ct. 1817 (1967).

[149] 397 U.S. 358, 90 S.Ct. 1068 (1970).

[150] 393 F.Supp. 847, 860, 862 (1975).

cludes that a state statute providing for parental consent

> protects the right of the parents to the liberty guaranteen them by the Fifth and Fourtenth Amendments. The statute protects the family relationship, the right and duty of parents to bring up their child, the right and duty of parents to inculcate moral standards; the statute provides protection for the parents' right and duty to make reasonable decisions . . . for the control and proper functioning of the family as a harmonious unit . . . The state has a compelling interest in protecting the parental rights and duties against unauthorized intrusion . . . Id.

The testimony at trial also clearly indicated the compelling need for a state regulation requiring parental consent in the case of an unmarried minor. It was the testimony of Dr. Warren, a physician who performed abortions, Mr. Peter Davis of Planned Parenthood, and Mrs. Judith Widdecombe of an abortion referral agency all testifying for the plaintiffs that written parental consent was required by them even prior to June 15, the effective date of the Missouri statute. But Dr. Warren's and Mrs. Widdecombe's testimony was that abortions would be performed on unmarried minors if consent were not legally required.

It was Dr. Warren's testimony also that the women, including minors, were "stressed to some degree whether or not to undergo an abortion. It's a stressful decision" (tr. 30). Mrs. Widdecombe described the abortion decision as a "crisis" situation.

Dr. Warren testified on cross-examination that even though he would perform abortions on minors without parental consent if it were legal, he preferred having the parent or guardian's consent because it gives evidence of family harmony. That family harmony was important to him as a physician (Tr. 71). The youngest woman who

had ever received an abortion from Dr. Warren was thirteen years old (Tr. 74). The youngest patient Mrs. Widdecombe's service had aborted was aged eleven, and the youngest they had ever counselled was age ten (Tr. 164).

Mrs. Widdecombe testified on cross-examination that the woman or girl "is encouraged to bring her husband or her boy friend or her family (because) those are the collaterals she needs, the support that they can give her and it needs to be a decision that can be made by everyone involved." (Tr. 155). After one to two hours of counselling, the *crisis* situation is evaluated and at that point she is given the options available to her.

Dr. Hanna Klaus testified for the defense that it was her practice and the practice of the institutions where she had worked, to require parental consent for surgery on an unmarried minor. Plaintiffs' counsel elicited Dr. Klaus' testimony on cross-examination that any abortion procedure in the first or second trimester has its inherent dangers no matter how well performed (Tr. 279).

Dr. William F. Kenkel, a sociologist specializing in marriage and the family, testified for the defense that in his opinion, a regulation such as 3(4) of the Missouri statute would strengthen the family as an institution in Missouri because it would promote both parental responsibility and the welfare of the child, too (Tr. 240).

Plaintiffs object to the parental consent provision of the Missouri statute as an "extra layer of regulation" on the abortion procedure even though the testimony at trial indicated that the requirement of parental consent was considered necessary to be obtained even before this statutory provision was passed.

The testimony also indicated, however, the strong desire on the part of plaintiff's witness to perform abortions on minors without parental consent. In this case, the state has

a compelling interest in passing such a regulation which *codifies existing practices* to leave no doubt as to the existence of such a requirement. It is not then an "extra layer of regulation."

As a further standard, *Roe,* at 155, provides that regulatory statutes be "narrowly drawn to express only the legitimate state interests at stake." The notion of consent requires that both the daughter and the parent share in the decision to abort; neither can give effect the decision without the other, for consent implies that there is something to consent to, in this instance, the minor's decision to abort. A parent could not be given a statutory right to determine unilaterally that a daughter should undergo an abortion, *In re Smith,*[151] and this statute has not been so broadly drawn as to attempt to give that power to a parent. On the other hand, the provision for parental consent assures that the minor daughter will not be left alone to undertake this decision which is awesome from any point of view.

Plaintiffs additionally oppose the requirement of parental consent because of the possibility of a parental veto being exercised over the minor's supposed right to an abortion. The remote problem of a parental veto, however, could be resolved by invocation of court in equity by the minor's best friend. This possibility is contained in the statute itself which provides for the consent of "one parent or a person in loco parentis."

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[151] 16 Md.App. ....., 295 A.2d 238 (1972).

VII.

THE NECESSITY FOR SPOUSAL CONSENT PROTECTS THE STATE'S COMPELLING INTEREST IN MARRIAGE

The statute before this Honorable Court provides for spousal consent prior to the termination of pregnancy. Consensual power is based on the legal relation of marriage, not on biological paternity or maternity. The state thus purports to find a sufficient compelling interest in the integrity of marriage and family life to preclude unconsented abortion where the life of the wife is not endangered. To protect this interest, the state acknowledges a joint interest and power of disposition of the married parties in their unborn child. That is, the unborn child is classified as a portion of the marital community and, as such, neither party may unilaterally terminate the other's interest. The power of the state to regulate abortion in this manner must necessarily flow from the state's power over and interest in the institution of marriage.

Marriage is both a basic civil right of man[152] and an institution upon which "society may said to be built".[153] Thus, the state may not unnecessarily impede the right to marry[154] nor procreate within marriage[55] but, nevertheless, re-

[152] *Skinner* v. *State of Oklahoma,* 316 U.S. 535, 541 (1942).

[153] *Reynolds* v. *United States,* 98 U.S. 145, 165 (1878).

[154] *Loving* v. *Virginia,* 388 U.S. 1 (1967).

[155] *Skinner* v. *Oklahoma, supra* at note 152; *Loving* v. *Virginia, supra* at note 155, where state miscegination statute purported to protect against racially mixed children.

tains an extremely broad power over its incidents and formalities, extending even to limitations on the practice of First Amendment Rights. [156]

> When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties and obligations . . . The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and none other.[157]

The state, moreover, maintains an interest in the "regularity and integrity of the marriage relation"[158] and may classify persons[159] and properties [160] in relation to marriage to protect and strengthen family life. Thus, states frequently recognize and codify joint spousal interest in tax obligations, properties, contracts, tort causes and decedent's estates. Such mutual interests are not subject to partition, rescission or termination without the application of statutory criterion, usually through termination of the marriage itself. The joint interest of husband and wife in their *child* is such that, even where their marriage has been terminated and the wife awarded custody of the child, she may not precipitously terminate the parental interests

[156] *Reynolds* v. *United States, supra* at note 153.

[157] *Maynard* v. *Hill,* 125 U.S. 190, 205 (1888).

[158] *Estin* v. *Estin,* 134 U.S. 541, 546 (1948).

[159] *Lavine* v. *Vincent,* 401 U.S. 522 (1971).

[160] *Id.*

of her former husband through adoption by a third party.[161] The state's regulatory entanglement in marriage and adoption requires it to recognize the interests of the husband as parent in the custody and care of his child.

It is therefore asserted that the state may recognize the joint and mutual interest of both parties to the marital relation in their unborn child where unconsented abortion presents a threat to compelling state interests in the integrity of marriage, demonstrated by the following considerations:

1. There is a direct relation between induced abortion and the incidence of infertility, subsequent spontaneous abortion, still birth and prematurity.[162] Besides affecting maternal health, the decision to abort may affect the procreative capacity of the entire marriage and thus affect the purpose and meaning of the marital relation.

2. States have the power[163] to refuse either spouse permission to marry while the other spouse lives and to penalize or prohibit procreative acts outside of marriage. By successively terminating her pregnancies, the wife would deprive her marriage of procreative capacity and her husband of a child. This power to block all marital procreation is likewise inconsistent with the purposes and meaning of the marital relation. Furthermore, the state retains the authority to determine the grounds for divorce. Thus, if the state should not choose to recognize a unilateral de-

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[161] *Armstrong* v. *Manzo*, 380 U.S. 545 (1965).

[162] Dr. Backer, Tr. 219, 223, Defts. Exs. V. O. S. and T.

[163] *Estin* v. *Estin*, *supra* at note 7; *Maynard* v. *Hill*, *supra* at note 6; *Crouch* v. *Crouch*, 28 Cal. 2d 243, 169 P.2d 897 (1946).

cision by the wife to abort contrary to her husband's wish as a legitimate ground for a divorce, the husband could be trapped in a marriage in which the procreative capacity of the woman is being destroyed, thus, in a marriage incapable of realizing one of its major purposes: the procreation and raising of children.

3. The relational integrity of marriage is protected by the mutual knowledge, consent and consultation of the parties in the important matter of child-bearing and procreation. Marriage has been defined as a "coming together for better or worse . . . an association that promotes a way of life . . . harmony in living . . . a bilateral loyalty."[164] The state here seeks to protect these aspects of the marital relation through the mutual consent of the parties to the disposition of their unborn child, much as this Court has determined that, through its interest in maternal health, the state might require the woman to procure and consult a physician will to perform the abortion at all stages of pregnancy.[165]

The Imbalance of the Rights and Obligations in Marriage in Relation to Unconsented Abortion

Unconsented abortion threatens the general purposes and integrity of the marital relation as well as the fundamental procreative, parental and marital rights of the husband in the specific unborn child his wife bears and thereby creates an imbalance in the rights and obligations of the parties to marriage. The state's power over, interest and entanglement in marriage permit it to recognize the hus-

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[164] *Griswold* v. *Connecticut*, 381 U.S. 479, 483 (1965).

[165] *Roe* v. *Wade*, 410 U.S. at 163.

band's rights and remedy the imbalance in the interests of the relational integrity of the institution.

> The Supreme Court has stated in essence that the woman has a fundamental right of private decision to terminate the pregnancy. No right of the fetus is recognized by that court, at least during the first two trimesters.
>
> But the father has rights. They are familial. They antedate the Constitution; they are about as old as civilization itself. They center in a main potentiality of his marriage: the birth and raising of children. Few human experiences have meaning comparable to parenthood. The father's rights asserted here are surely among the fundamental rights protected by the Constitution. [166]

The husband is an indispensable party to the marital relation and to the ideal exercise of procreative and parental rights and duties, as our law conceives of them. In no case is the husband foreign to the "zones of privacy" which protect fundamental parental,[167] marital[169] and procreative [169] rights.

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[166] Dissenting opinion of Hennessey, J., *Doe* v. *Doe*, Mass., 314 N.E.2d 128 at 134 (1974).

[167] *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

[168] *Griswold* v. *Connecticut*, *supra* at note 164; *Loving* v. *Virginia*, *supra* at note 154; *Bodie* v. *Connecticut*, 401 U.S. 392 (1971).

[169] *Skinner* v. *Oklahoma*, *supra* at note 1; *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

> In each case the right of privacy was but the correlative of the duty of the State to refrain from activity to which, by virtue of the limited nature of our constitutional government, it is obliged to remain a stranger. But who will assert that the husband here is, or could ever be, a stranger to the destruction of the fetus which he begot or to the possible future birth of his child? At base it was respect for the intimacy of certain sectors of human life which compelled the decisions of the Supreme Court insisting that government refrain from interfering in these private determinations. It is that same respect which informs us that a potential father's rights in the birth of a child cannot be dissolved by unreasoned reference to the Fourteenth Amendment. [170]

The husband cannot be reasonably said to be alien to the "zone of privacy" which protects the decision to abort: procreative capacity is by nature exercised by male and female together; under law, it ought to also be exercised by husband and wife together. Marriage, procreative and parental rights secured for the husband are not so separable, fragmented and unrelated that they cannot bear upon a wife's decision to terminate a pregnancy. The husband's procreative rights, once manifest, are not satisfied by the mere existence of embryonic life followed by its termination; parental and marital rights cannot be separated in a wholly artificial manner from the procreative capacity that brings them into being and renders them meaningful in the larger context of familial relations. The *affirmative* right of the male, "married or unmarried", [171] to decide to

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[170] Dissenting opinion of Reardon, J., *Doe* v. *Doe*, Mass., 314 N.E.2d 128 at 136 (1974).

[171] *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972).

beget and raise children is hollow indeed if the state may not, in some circumstance, act to secure his interests. Otherwise, even the husband is reduced to a mere "fertilizer" or "facilitator" of his wife's procreative decisions—forever dependent on his wife's decision to realize his procreative and parental rights and interests. To deny the husband an interest in his unborn child is to grant that the mere reproductive reflex of the female body renders the wife immune from all human claims—claims based on fundamental human rights—which the husband has upon the child she bears. We submit that such a concept of marital procreation, a doctrine of intra-uterine *materfamilias,* has no place in our concept of marriage, cannot be reconciled with the modern principle of equality of marital partners and is completely unreasonable in light of the responsibilities the husband must bear if the child is brought to term.

Either or both marriage partners may suffer the legal, economic, social or psychological "detriments" which, as this Court has observed, [172] may result from pregnancy and subsequent parenthood; either or both may suffer social, economic, legal or psychological detriments as the result of an abortion. Legally enforceable duties are incurred by the husband if the child is brought to term; legally enforceable duties may be incurred if the wife chooses to abort—for example, economic liability for the medical procedure and whatever complications which result in the woman or subsequent children of the marriage. Here, the joint interests and responsibilities of the parties to marriage create obligations and liabilities in the husband. Yet, if he is denied a joint interest in the disposition of unborn children to his marriage, he is burdened with all

[172] 410 U.S. at 153.

the liabilities and none of the prerogatives of decisions to bring children to term or not.

Thus, from both theoretical and practical perspectives, obvious imbalances and inequities are created in the marital relation where the wife may procure abortion without reference to the interests of her husband. Such imbalances threaten the integrity of marriage. The State of Missouri here hopes to remedy them through a statutory recognition of the interests of both parties in the disposition of unborn children which are products of their marriage.

Parental Rights and Interests of the Husband in an Unborn Child of His Marriage

Thus far we have urged this Court to recognize the compelling state interests served through a statute requiring spousal consent to abortion through protecting the meaning and purpose of marriage, promoting the mutuality of its parties and fostering the integrity of the institution by balancing the rights and duties of husband and wife. Finally, we argue that it provides a mechanism to secure the fundamental parental rights of the husband. In other words, the statutory provision implements already existing parental rights of the husband. We assert that the same parental expectations and interests which would protect the mother from coercive abortion [173] according to our Constitution accrue to husband and wife alike.

This Court intended neither to institute "abortion on demand" [174] nor to affirm the concept that "one has an unlimited right to do with one's body as one pleases." [175]

[173] Surely this Court meant in *Roe* that the right to decide to abort includes the right to carry a child to term.

[174] *Doe* v. *Bolton,* 410 U.S. at 189.

[175] 410 U.S. at 154.

In *Roe* it explicitly declined consideration of the husband's or father's interests in the abortion decision. The nature and extent of the limitation to "right to privacy . . . broad enough to encompass a woman's decision whether or not to terminate her pregnancy" [176] were decided solely on the basis of the state interests, i.e. maternal health and potential human life, which were presented by the Georgia and Texas statutes then before this court. (See Supra, Section II). Although the state retains an interest in potential human life *throughout* pregnancy, this interest alone is insufficient to prevent the mother from terminating her unique relationship with the unborn child until it is capable of "meaningful life outside the womb". [177] However, given the situation in which the wife wishes to reject parenthood by terminating her pregnancy but her husband does not, the combination of state's interest in potential human life, its important interest in the regulation of marriage and abortion, and the already existing private rights of the husband, allows the state to recognize and implement the husband's parental interest in the live birth of his unborn child to be superior to his wife's private interest in its destruction and to implement this recognition via a statutory enactment of the type before this Court.

The right to terminate a pregnancy, to remove a fetus or embryo from the womb, does not imply superior possessory or quasi-parental rights of the mother in her unborn child. Clearly, the nature of the abortion decision implies the rejection of any interest she might have in the child after birth. (See Infra, Section VIII.) But from this perspective, when the wife terminates her pregnancy, she rejects parenthood not only for herself but also her husband.

[176] 410 U.S. at 153.

[177] 410 U.S. at 163.

Furthermore, by deciding to abort, the woman may avoid the temporary problems of pregnancy whereas her decision does permanent injury to a father who desires the affection and companionship of his child. Where the husband is allowed no decision making authority in the disposition of an unborn child which is a product of his marriage, his private legal interests in his unborn child totally lack the protection of law.

> The private interest here . . . undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." [178]

If the "rights to conceive and raise one's family have been deemed 'essential', [179] such rights must surely extend to protection, care, custody and management of a husband's child to be born of his marriage sufficient to preclude an arbitrary decision of his wife to deprive him of his child's companionship.

This Court has recognized that tort and inheritance law "vindicate the parents' interest" [180] (emphasis added) in potential human life. The theory which would grant parental recovery for the wrongful death or injury to their child only if the child lives is grounded upon joinder of parental interests with those of the child: the parent may recover only if the child could have recovered if it had sur-

[178] *Kovacs* v. *Cooper*, 336 U.S. 77, 95 (1949), quoted in *Stanley* v. *Illinois*, 405 U.S. 645, 651.

[179] *Stanley* v. *Illinois*, 405 U.S. 645, 651.

[180] 410 U.S. at 162.

vived.[181] But the interest asserted here on behalf of the husband is not dependent upon recognition of the full humanity of the unborn or the ability of the parent to maintain an action for wrongful death or injury to a previable child: the interest asserted here is *separate and apart* from the interests which the unborn might assert on its own behalf and, as such, does not require joinder of parental interests with the interests of the unborn. Recognition of a *parental* interest in the unborn depends upon the fact that, absent accident or human intervention, the *relationship* of parent and child would inevitably arise.

The interest the law recognizes between parent and child is "relational",[182] as are the other interests that accrue to family members by virtue of the familial relationship; such interests are cognizable at law when the expectations that arise from present circumstances are denied fruition.[183] Constitutional protection has been ac-

[181] Note, *Law and the Unborn Child,* 46 Notre Dame Law 349 (1971).

[182] See generally Green, *Relational Interest,* 29 Ill. L. Rev. 460 (1934); Pound, *Individual Interest in Domestic Relationships,* 14 Mich. L. Rev. 177 (1916).

[183] Seen generaliy W. Prosser, Handbook of the Law of Torts 873-888 (4th ed. 1971). Alienation of affections, criminal conversation, loss of consortium of husband and wife or parent and child may form the basis of a tort of interference in family relations. Unconsented abortion could form the basis of a tort where alienation of the procreative facility is thought an offense against marriage, as alienation of affections or criminal conversation constitute an offense against the sexual aspect of marriage. Adultery, fornication and bigamy are crimes against the relational integrity of marriage. See 13 Journ. Fam. Law 311 (1973-74) for inadequacies of tort remedies. Unless an interest of the husband or father is recognized in his unborn child, the development of a tort seems unlikely.

knowledged on behalf of the integrity of family relations on numerous occasions.[184]

Likewise, the "relational" interests of the parties to marriage and family, in situations in which one party would attempt to terminate the interests of the other, have been given constitutional protection. As before noted, the state must recognize the interests of even a divorced husband where his former wife, who had been awarded custody of the child of their marriage, attempts to dispose of his interest through adoption by a third party.[185] Disestablishing a sexual stereotype enshrined in state law and recognizing the "private" relational interests of even putative fathers, this Court has ruled that an unmarried father may not be conclusively presumed an unfit parent,[186] citing the same precedents in support of his parental interests as employed by this Court, to support the woman's right to terminate her pregnancy. The state may not conclusively presume that custody and care of children be granted to unmarried mothers in derogation of the parental interests of unmarried fathers.[187] If this Court has seen fit to recognize the parental rights of putative fathers whose children might be disposed to the custody and care of the state or even their natural mother and has seen fit to recognize the parental rights of divorced husbands whose former

[184] See note 167 *infra.*

[185] *Armstrong* v. *Manzo, supra* at note 161.

[186] *Stanley* v. *Illinois,* 405 U.S. 645 (1972). The rights of the father were recognized as fundamental. 405 U.S. at 651.

[187] *Rothstein* v. *Lutheran Social Services,* 405 U.S. 1051 (1972); *Vanderlaan* v. *Vanderlaan,* 405 U.S. 1051 (1972).

wives release the custody of the children of their marriage to third parties, how can one reasonably assert that the husband of an intact marriage has no rights in situations where his wife would permanently dispose of his child through the abortion decision?

The state interest in children and entanglement in the regulation of custody procedures allowed, *required* it to recognize the "private" parental interests of husband and father in *Stanley, Vanderlaan, Lewis* and *Armstrong.* Likewise, we urge this Court to recognize that the state's residual interest in potential human life throughout pregnancy, its entanglement and interest in marriage and abortion permits it to recognize these same parental interests of the husband when abortion threatens to deprive him of legitimate fatherhood in a manner far more effective, permanent and unappealable than through adoption or relinquishment of custody and care to the state. The parental expectations of a husband whose wife bears a child are as strong, as tangible and as cognizable at law as those of putative fathers and divorced husbands.

The superficial analysis of the Fifth Court of Appeals in *Poe* v. *Gerstein,*[188] that under *Roe* v. *Wade* the fetus is not a person, therefore it is not a child, does not answer this argument. What this Court had the authority to decide and what this Court did decide in *Roe* v. *Wade* was whether an unborn human being enjoyed the protections of "persons" under the U.S. Constitution. This Court concluded that the fetus was not a constitutional person. This Court did not decide that the fetus was not a "person" under other theories of law or an object subject to the relational or common law parental interests of a father.

[188] *Poe* v. *Gerstein,* CA 5, 8/18/75, 1 FLR 2743.

The parental interest of the husband cannot be reasonably attached to the trimester criterion previously established by this Court for state regulation in relation to its interests in maternal health and potential human life. One reason for this is that the trimester division determined by this Court in *Roe* for the allowance of state intervention to protect maternal health was based on medical statistics concerning the relative mortality rates in first trimester abortions versus natural childbirth (See Supra, part ....). These statistics obviously have no relation to any parental interests in the husband which have always existed at common law. The fruition of parental interests are most pointedly threatened in the early stages of pregnancy when abortion will most certainly prevent the live birth of a healthy child and the husband's rational interest is, in any case, violated at any time abortion threatens to defeat his tangible parental expectations.

The existence of state and parental interests in potential human life distinguishes abortion from contraception—this Court has recognized that consideration of abortion involves interests that caused the case before it to be "inherently different than . . . *Eisenstadt.*"[189] Individual decisions whether to contracept or not do not involve existent potential human life to which state interests and parental expectations may be attached.

Finally, we urge this Court to further consider scientific advances which emphasize the urgency of recognizing a husband's parental interest in his unborn child.[190] It is

[189] 410 U.S. at 159.

[190] This Court recognized such advances in *Roe* v. *Wade,* 410 U.S. at 161.

clear that such techniques as artificial insemination,[191] *in vitrio* fertilization, embryo transfer and transplantation [192] and fetal experimentation,[193] as well as the techniques used in abortion,[193a] raise serious issues as to the rights and interests of father and husband before the viability of the unborn child.

We strongly urge this Honorable Court to find that unconsented abortion may threaten the purposes and integrity of the marital relation. The compelling interest of the state in marriage should permit it to classify the unborn child of a marriage as a portion of the marital community, subject to disposition, where the life of the mother is not endangered, only by the mutual consent of the parties to marriage.

We further urge this Court, in the course of deciding the constitutionality of the statute now before it, to acknowledge that fundamental rights of the husband bear upon an

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[191] See Comment, *Artificial Insemination and the Law*, 1968 Ill. L.F. 203 (1968); Guttmacher, *Artificial Insemination*, 18 DePaul L. Rev. 566 (1969).

[192] See Oakley, Test Tube Babies: *Proposals for Legal Regulation of New Methods of Human Conception and Prenatal Development*, 8 Fam. Law Q. 385 (1974).

[193] Proposed regulations governing fetal experimentation require the natural father's consent, if known. *Federal Register*, Proposed H.E.W. Reg. 46, 306, 39 Fed. Reg. 30654 (Aug. 23, 1975).

[193a] Though not related to the needs of the mother, physician and wife may choose methods of abortion which insure the death of the fetus even if other methods were employed, the child might survive. Likewise, methods which cause the fetus great pain (or make no effort to alleviate pain)—surely of concern to the unconsenting father or husband.

unborn child to be born of his marriage which the state may protect through regulation of the marital relation. We trust that this Court is sensitive to the important consequences to the legal nature of marriage and parenthood its decision will here effect.

VIII.

PARENTAL RIGHTS ARE PROPERLY TERMINATED AND PROTECTED

Section 7 of the statute provides that in the event a live-born infant results from an abortion not performed to save the life or health of the mother, the child shall be an abandoned ward of the state and the mother and father, if he consented to the abortion, shall have their parental rights terminated.

Section 8, intended to be read and construed with section 7, provides that any woman seeking an abortion shall be verbally informed of the provisions of section 7 by her physician, and that the woman shall certify in writing that she has been so informed.

The issues are: 1) whether such statutory provision violates the due process rights of the biological mother and father; and 2) whether such statutory provision is in conflict with previous decisions of this court.

The rational interpretation of these sections is that where an abortion consent has been signed by the parents and the mother has been informed that her parental rights will be terminated if a live birth results from the abortion, and she then proceeds to have an abortion despite this knowledge, a constructive abandonment of the live infant is effectuated.

The state as parens patriae has a wide range of power for limiting parental freedom in matters affecting the child's welfare.[194] Almost all the states have statutes making abandonment of children a crime and providing that the child may then become a ward of the state. This power is based on the state's duty as parens patriae to protect its citizens who are unable because of infancy to take care of themselves,[195] and on the right of the child to the protection of the state, as well as the state's interest in its own perpetuation.[196]

A parent may voluntarily relinquish his right to custody by abandoning the child.[197] Generally, this abandonment must be of a positive kind. To constitute such abandonment or desertion of a child within the meaning of statutes making it an offense, there must be an actual, voluntary, or willful *desertion* of the child with an *intent* to sever the parental relation entirely, so far as it is possible to do so, and to throw off all obligations growing out of such relation.[198]

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[194] *Prince* v. *Massachusetts*. 321 U.S. 158, 167, 88 L.Ed. 645, 64 S.Ct. 438 (1943).

[195] *Oakes* v. *Oakes*, 45 Ill. App. 2nd 387, 195 N.E.2nd 840, 99 ALR 2nd 949 (1964).

[196] *Wilson* v. *Mitchell*, 48 Colo. 454, 111 P. 21 (1910); *Finlay* v. *Finlay*, 240 NY 429, 148 NE 624, 40 ALR 937 (1925).

[197] *Lally* v. *FitzHenry*, 85 Iowa 49, 51 NW 1155 (1892); *De Witt* v. *Brooks*, 143 Tex. 122, 182 SW2nd 687 (1944).

[198] *Brooke* v. *State*, 99 Fla. 1275, 128 So. 814, 69 ALR 1173 (1930); *People* v. *Dunston*, 173 Mich. 368, 138 NW 1047 (1912).

When the parents sign the abortion consent and then the mother, in writing, certifies that she knows that her parental rights will be terminated, and finally she undergoes the abortion, the two requirements of abandonment are fulfilled. The desertion is the physical abortion: the effort to prematurely and at risk to the fetus rid herself of the fetus. The intent to entirely sever the parental relation is fulfilled by the abortion itself, as well as by the fact that the abortion is done with full knowledge by the mother that her parental rights will be terminated if a live birth results.

A parent cannot be deprived of his parental rights without due process of law.[199] Before parental rights are terminated, it must be made to appear in some manner that the parents have legally surrendered or forfeited such rights.[200] These requirements of due process and a legal surrender of parental rights are fulfilled by the signed consent to the abortion of the product of conception and the acknowledgement that any parental rights will be terminated if a live birth results.

In *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), this Court addressed itself to the 14th Amendment and stated that "... it denotes ... the right of the individual ... to marry, establish a home and bring up children." The Missouri statutory provisions under consideration do not diminish these rights: they merely provide for the due process procedures of written consent to the abortion and written acknowledgement of the termination of parental

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[199] *Stanley* v. *Illinois*, 405 U.S. 645, 31 L.Ed.2nd 551, 92 S.Ct. 1208 (1972).

[200] *Sherry* v. *Doyle*, 68 Utah 74, 249 P. 250, 48 ALR 131 (1926).

rights in order that the desire of parents not to raise a child may be knowingly and constitutionally effectuated. The signed consent and informed acknowledgement conclusively demonstrate the deliberate, willful, intentional desire of the parents to close off forever their duties and responsibilities to a liveborn child.

As Dr. Warren testified at the trial of this case, the abortion decision is a "stressful" one. (R. 30). By signing the consent and the certification of knowledge of loss of parental rights, the abortion decision and its consequences become even more real and concrete to the mother: only after this does she have the abortion. These sections are not, as appellant argues, a threat to dissuade women from electing abortion: rather they operate as a safeguard against impulsive action by bringing home to the woman the seriousness and the consequences of the abortion decision. The sections have the effect of easing the already burdened mind of the mother. By virtue of sections 7 and 8 the mother is aware of the fact that the fetus she does not want will, if born alive, be provided for.

Sections 7 and 8 are controlling only in the event of a live birth. During the first trimester, when the abortion decision belongs exclusively to the mother and her physician, there is no medical possibility of a live birth. Thus these sections will take effect only after the first trimester, when it is reasonable and appropriate for a State to decide that the interest of potential human life becomes significantly involved. [201]

If sections 7 and 8 are held invalid, the situation may well present itself of parents who, for whatever reason, be it monetary, psychological, or otherwise, have made the

[201] *Roe* v. *Wade,* 410 U.S. 113, 159, 93 S.Ct. 705, 35 L.Ed.2nd 147 (1973).

stressful decision to have an abortion fully expecting it to be conclusive; that is, the delivery of a dead fetus. Subsequently they will be handed a live, viable child which probably requires medical attention because of its prematurity: a child they had not planned for, had not wanted, and towards whom they had sought to avoid all parental responsibilities.

The statute is not punitive in nature—its intent is not to punish parents by having their live-born children declared wards of the state. The provisions are rather remedial in nature, recognizing that some parents do not want to have a child: that this desire is so strong that they carry out an abortion attempt which results in an unwanted child. The provisions attempt to remedy the situation of both the parents and the child. The parent is relieved of his obligations and duties towards the child, as he desired, and the live-born fetus will be cared for as a ward of the state. This is a much more practical and desirable result than having an unwanted child living with parents who have already decided that they are unable or unwilling or both, to assume parental responsibilities towards that child.

The exact nature of parental rights has never been closely determined in a legal sense. Some courts say the relationship is one of "personal trust". [202] Some courts state that the parent-child relationship is a status, not a property right, and thus upon adoption a different status is created. Juvenile courts often take custody of a "neglected" child. The term "neglect" is one whose meaning has not been absolutely defined, but it generally contemplates

[202] *Moreau* v. *Buchholz,* 124 Colo. 302, 236 P2nd 540 (1951); *Re Tom,* 37 Hawaii 532.

the failure of the parents to exercise the care that circumstances justly demand and includes willful as well as unintentional disregard of duty.[203] A denial to a child of affection, guidance and consideration, amounting to a rejection of the child . . . is as neglectful as a failure to provide for the ordinary physical needs of the child.[204]

Applying the above theories and rules of neglect, it is evident that by signing an abortion consent, acknowledging the termination of parental rights, and then having the abortion, the parents have rejected the "personal trust" that is implied between parent and child, and they have voluntarily relinquished their "status" as parents. Further, these acts of the biological parents amount to a constructive neglect situation with the liveborn infant because desiring and carrying out an abortion is tantamount to a denial of affection and consideration and is indeed failure to provide for the ordinary physical needs of the viable fetus. At the very least, these acts imply a conscious rejection of parental responsibilities and resulting neglect. A recent decision involving similar reasoning buttresses this fact. In the case of *In re Orzo,* NY FamCt Ny City (11-18-75) the court held, pursuant to a New York statute, that because a mother "failed substantially to plan for the future of her children for a period of more than four years" her parental rights could be terminated (2 Family Law Review 2072, 12-9-75). If parents who do not plan more than four years in advance for their children may have their rights terminated, it is clear that those parents who do not plan at all for their children's future, who in-

[203] 47 Am.Jur.2nd., Juvenile Courts, Etc. § 25 p. 1005 (1969).

[204] Ibid., *Re Carl,* 174 Misc. 985, 22 NYS2nd 782 (1940).

deed strongly desire and have taken positive action in order not to be burdened or blessed with children, should also have their rights terminated, as they have manifested a desire to do, in the best interests of those children.

The above discussion has demonstrated the power of the state to take custody of a child when it is deemed abandoned or neglected and that the requirements of abandonment and neglect are fulfilled by the consent of the parents to the abortion, the acknowledgement by them of their termination of parental rights, and the abortion attempt.

By virtue of the live birth, the requirement of "personhood" is fulfilled [205] and the infant is thus entitled to the protection of the 14th Amendment. The clear intent of sections 7 and 8 of the Missouri statute is to entitle the infant who is unwanted by his biological parents to the protection of the state. The ultimate test is what is in the best interests of the infant who survives the abortion. That best interest is not satisfied by exiling such infant to the custody of parents who have taken steps to thwart his or her very existence.

The appellant argues that these provisions are directly contrary to explicit holdings on the identical question in *Doe, et al.* v. *Rampton, et al.,* 366 F. Supp. 189 (D. Utah, 1973), *Stanley* v. *State of Illinois,* 405 U.S. 645 (1972), *Roe, et al.* v. *Wade,* 410 U.S. 113 (1973), *Doe et al.* v. *Bolton, et al.,* 410 U.S. 179 (1973) and *Jones* v. *Smith, et al.,* 278 So. 2nd 339 (Fla. Ct.App., 1973), cert. denied, 415 U.S. 958 (1974). Each of these cases involves completely different statutes, facts and issues than those in sections 7 and 8 of the Missouri statute.

[205] Cf. *Roe* v. *Wade,* supra.

Doe v. *Rampton* was a 1973 opinion rendered by a three judge Federal court with Judge Lewis specially concurring and Judge Anderson concurring in part and dissenting in part. The Utah statute had a similar provision to section 7 of the statute now under consideration. The Utah statute stated that any child surviving an abortion shall be a ward of the state and that the parents who consented shall have no parental rights. (Chapter 7, Title 76, section 311, Utah Code Annotated 1953). This section was declared invalid because:

> ". . . it threatens every woman who has an abortion, at any stage of pregnancy and for any reason, with termination of parental rights without due process of law." *Doe* v. *Rampton,* supra, p. 193.

The crucial distinction between the Utah and Missouri statutes is that the former has no provision comparable to section 8 of the latter, and thus the former is not controlling.

Section 8 provides that a woman be verbally informed of the fact that she and the father, if he consented, shall have no parental rights in the case of a live-born infant. When she certifies in writing that she is so informed and then voluntarily has the abortion, the requirements of due process are fulfilled and she has voluntarily and knowingly waived and forfeited the parental rights.

The right to conceive and raise a family is, of course, "essential",[206] yet this right may be surrendered. This court has stated that:

> ". . . the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

[206] *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923).

However, if the parents choose to abort thus choosing not to accept the custody, care and nurture of the child, the requirements of due process are met and the state must assert its power in the child's best interest. Section 8 provides for an implied consent to the terms of section 7 of which the parents have been advised. When, after being informed of their possible loss of parental rights, the parents proceed to have an abortion, it is clear that the parents have waived their rights consistent with due process.

Because sections 7 and 8 together fulfill due process requirements, *Doe* v. *Rampton* should not be considered by this court on the issue of termination of parental rights.

Stanley v. *Illinois,* supra, held that under the due process clause of the 14th Amendment an unwed father of two children was entitled to a hearing on his fitness as a parent before his children were taken from him upon the death of their mother. That case is totally opposite from the one before the court. The Missouri statute involves live-born infants whose parents had attempted to abort them and had further shown a conclusive desire not to exercise any parental rights nor accept parental obligations towards them. *Stanley,* on the other hand, involved a parent who actively sought to exercise his rights and obligations to his children, who were beyond infancy.

This statute expresses no presumption of unfitness on the part of parents who choose to abort. It merely provides that if parents do make this decision after full realization that all parental rights will be terminated, the resulting live birth, if any, shall be a ward of the state, since the parents have clearly chosen not to accept it.

Thus *Stanley,* on its facts and the reasoning involved, is not relevant in a consideration of sections 7 and 8.

Roe, supra and *Doe,* supra, likewise should not be regarded as controlling here because the issue of termination of parental rights was not before this honorable court in those cases. The Texas abortion statute considered in *Roe* and the Georgia statute considered in *Doe* contained no provisions similar to sections 7 and 8.

In the *Jones* case, firstly, the cause of action was brought by a putative father who was attempting to restrain the mother from having an abortion. They were unmarried. In the second place, the issue in that case is very different from the one presented here. In *Jones,* the court phrased the question as being 'does a potential putative father have the right to restrain the natural mother from terminating a pregnancy resulting from their cohabitation?' The issue here is whether sections 7 and 8 providing for termination of parental rights if a live birth results from an abortion violates due process rights. As in *Roe* and *Doe,* supra, the issue presented here was not addressed in *Jones,* either; thus *Jones* is not controlling.

It is clear, then, that none of the cases appellant has cited in opposition to sections 7 and 8 are controlling in the issue.

Appellant also attacks the Missouri provisions on the ground that putative fathers are not required to consent to an abortion, thus granting to putative fathers greater rights than to spouses of the pregnant woman. The reasons why such fathers are not required to consent is stated well by Chief Justice Burger in his dissenting opinion in *Stanley* v. *Illinois:*

> "Unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood." (*Stanley,* supra, p. 665)

It is a well known fact that in many cases the putative father cannot be found or cannot be identified or would like to avoid any dealings with the woman who is carrying the child. To require his consent to the abortion would place impossible burdens on the mother who desires the abortion—she would have to find the father, and possibly even bargain with him for his consent, not because he wants the child, but because he wants some benefit, monetary or otherwise, for himself. This situation would be intolerable and would lead to great abuse of persons involved, especially the mother and child. For these reasons, the Missouri legislature has allowed the unwed mother to secure an abortion without the consent of the putative father. This is a rational, practical distinction which eases the burden on the single woman seeking an abortion.

The provision in the statute requiring the spouse to consent is a recognition by the legislature that the spouse generally has much more interest and concern in the abortion decision than the unmarried male. In the interests of family harmony and the marital relationship, the abortion decision should be arrived at by husband and wife together, at least after the first trimester.

In conclusion, with respect to the state's important and legitimate interest in potential life, the "compelling point" is at viability.[207] When the infant is born alive, it is obviously viable and in sections 7 and 8 the state of Missouri has asserted its legitimate interest. The subject matter of these sections is not maternal health or even potential life, but rather an existing infant. "The State's power to protect children is a well-established Constitutional maxim." [208]

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[207] *Roe* v. *Wade,* supra, p. 163.

[208] *Shelton* v. *Tucker,* 364 U.S. 479, 485 (1960).

Because the live-born infant is unwanted by its parents; because they have chosen and consented to an abortion; because the mother has certified in writing that she knows that if a live-birth results, her parental rights may be terminated, and because the parents have chosen not to accept their parental rights and responsibilities, the child is "abandoned" and "neglected" and may be declared a ward of the state.

A mother who is the victim of an unwanted pregnancy, who desires an abortion, should not then be forced to keep an unwanted child with the attendant responsibilities, or to go through lengthy adoption or custody proceedings. She has made an extremely difficult decision and knows that, if born alive, her child will be protected. If these sections are held unconstitutional she will be forced to keep the unwanted infant. As this honorable court stated so eloquently in *Roe:*

> "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved." [209]

Our previous argument was based on the statute itself without reference to other Missouri statutes. However, as to the argument of Plaintiffs that this section of the statute lacks due process standards protecting the parents, the majority opinion of the court below correctly stated:

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[209] 410 U.S. at 153.

> "In the rare instance in which a live birth would result from an attempted abortion the state would be justified in assuming immediate temporary custody of the unwanted child. It is a simple matter for the juvenile court to insure that parents of such a child be given an adequate opportunity to be heard before parental rights are permanently terminated. Section 7 specifically provides that the parents of a child aborted alive shall have no parental rights as if their "rights had been terminated pursuant to section 211.411" (sic) of the Missouri Revised Statutes. RSMo. 211.411 sets forth the circumstances under which parental rights may be terminated. These circumstances include abandonment of the child, which is exactly the situation Section 7 is designed to protect. Chapter 211 of the Missouri statutes provides for notice, an opportunity for the parents to be heard and present testimony on their behalf, right to counsel and right to a jury trial of the issues. House Bill 1211 thus incorporates by reference statutory due process guarantees which provide adequate protection to the parents of a live aborted child who might desire to regain custody of such a child."

Thus it is clear either from a consideration of the statute itself or in conjunction with other applicable Missouri statutes that the due process rights of the parents are fully protected before permanent termination. In the rare and hardly foreseeable instance where parents change their mind after the abortion, the full panoply of due process rights are guaranteed them under RSMo. 211.411 which provides for notice, an opportunity to be heard, right to counsel and even a right to a jury trial, if it should be desired.

IX.

THE PROHIBITION OF SALINE AFTER THE FIRST TRIMESTER IS A REASONABLE REGULATION FOR PURPOSES OF MATERNAL HEALTH

The court below upheld Section 9 of the Missouri statute which forbids the method of saline abortions. Section 9 reads as follows:

> "The general assembly finds that the method or technique of abortion known as saline amniocentis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy."

The court below upheld this section as a reasonable state regulation in the interest of maternal health. Much testimony was elicited on this issue and discussed by the court in its opinion. The testimony of Dr. Anderson, Chairman of the Department of Obstetrics and Gynecology at Yale University School of Medicine is replete with the dangers to maternal health from saline abortions. As he indicates, the major complications such as sudden death syndrome that occur from hypernatremia, tissue destruction in uterine cavity, (Tr. 308) and bleeding coagulopathies (which occur in all saline abortions) (Tr. 306) do not occur with the use of prostaglandins. Whereas maternal mortality for saline abortions was 25 deaths in 100,000 abortions (Tr. 330) there were no deaths associated with prostaglandin abortions done intra-amniotically. (Tr. 323)

Saline abortions were banned in Japan by the government because of a very high mortality rate. (Tr. 323). Dr. Anderson who has participated in thousands of abortions, stated that a physician who used saline after being presented all the facts on prostaglandins, if a bad result occurred, would be subject to "good grounds for suit." (Tr. 336). He said:

> "In my opinion, a physician, given all the facts on both methods (saline and prostaglandin) I would feel that he would be practicing bad medicine if he chose saline over prostaglandins." (Tr. 336).

Prostaglandins, although initially limited in distribution are now available on a much wider and adequate scale. (Tr. 335). And are, in fact, used widely in small hospitals. (Tr. 341). The saline method is not used at Yale-New Haven Hospital because of the dangers to maternal health. (Tr. 359).

The mortality and morbidity of saline abortions are well documented in the medical literature as even Plaintiff-Appellants admit in their brief.[210] This is concurred in by the Statement of the National Academy of Sciences in its Institute of Medicine Report on "Legalized Abortion and the Public Health" (Washington, D.C., May, 1975) where, in discussing saline abortions, the complications of which "are considerably higher than those performed by D & C or suction"[211] it states "methods are needed to reduce these complication rates."[212]

Plaintiff-Appellants argue that in spite of all the adverse effects of saline on maternal health, they should be allowed to practice medicine without interference from the law and that the control of their conduct is best regulated by "professional censure and deprivation of his license." (p. 126).

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[210] Plaintiff's Brief, p. 124.

[211] Op. Cit., note 136 at p. 54.

[212] Idem.

The real question facing this court, however, is whether the state in the exercise of its police powers, after the first trimester, can prohibit a procedure (saline abortions) so dangerous to maternal health that other nations (Japan) have voluntarily abondoned it? The answer is obviously yes.

As Justice Douglas said in his concurring opinion in *Doe* v. *Bolton:*

> "While childbirth endangers the lives of some women, voluntary abortion at any time and place regardless of medical standards would impinge on a rightful concern of society. The woman's health is part of that concern; as is the life of the fetus after quickening. These concerns justify the State in treating the procedure as a medical one." [213]

This court has previously held that the police power of a State may embrace authority to enact quarantine and health laws of every description. As long as the method used does not contravene the Constitution or infringe any right granted by it, the State is free to use its own discretion as to how best to safeguard public health.[214]

To this end statutes ordering the destruction of unsafe and unwholesome food have been upheld.[215] The practice of medicine has long been the subject of regulation.[216] This court has upheld a New York law authorizing suspension of the physician's license for conviction of a crime.[217]

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[213] 410 U.S. 179, 215.

[214] *Jacobson* v. *Massachusetts,* 197 U.S. 11 (1905); *Lieberman* v. *Van De Carr,* 199 U.S. 552 (1905).

[215] *North American Storage Co.* v. *Chicago,* 211 U.S. 306 (1908).

[216] *McNaughton* v. *Johnson,* 242 U.S. 344, 349 (1917)

[217] *Barsky* v. *Board of Regents,* 347 U.S. 442 (1954).

Certainly the power to revoke a physician's license altogether includes the very limited power of merely prohibiting him the right to use a single medical procedure especially where that medical procedure has the grave adverse effects on maternal health as does saline abortion. Such a prohibition is no different than state regulations pertaining to the administration, sale, prescription, and use of dangerous drugs.[218]

Plaintiff argues that Section 9 should fall because saline is the most frequently used method of 2nd trimester abortions. The answer to that was given by Justice Holmes:

> "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." [219]

Is it reasonably prudent for this court to overrule a legislative finding backed by expert testimony and overwhelmingly supported by the medical literature of the catastrophic danger to maternal health which saline abortion poses? Japan, a nation which has far more experience in this matter, has voluntarily abandoned saline abortions for reasons of maternal health.

Plaintiffs argue that these compelling reasons for the State to act are overridden by the physician's right to practice his profession even if he is wrong for in that case he may be sued or subject to licensure restrictions. Little good that will do for the woman who in the meantime has been permanently injured.

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[218] *Whipple* v. *Martinson,* 256 U.S. 41, 45 (1921).

[219] *Texas and Pacific Ry.* v. *Behymer,* 189 U.S. 468, 470, 23 S.Ct. 622, 623, 47 L.Ed. 905 (1903).

Justice Learned Hand forever put that concept to rest:

> "In most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." [220]

So too, there are precautions for maternal health so imperative that even their universal disregard by the current medical profession would not excuse their omission. That in essence was what Dr. Anderson was saying in his testimony. That is precisely what the Missouri legislature said when it prohibited saline abortions. In spite of all this empirical data, this court has on other occasions upheld state legislation in the area of public health, welfare and morals with even far less or no data available. For example, in *Paris Adult Theatre* v. *Slayton,* 93 S.Ct. 2628 (1973) this court said at pp. 2637-38:

> *From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions.* . . . On the basis of these assumptions both Congress and state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing "coupons" and "trading stamps," commanding what they must and may not publish and announce. . . .
>
> *The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.* If we accept the unprovable assumption that

[220] The T. J. Hooper, 60 F.ed. 737, 740 (2nd C. 1932).

> a complete education requires the reading of certain books . . . and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? . . . The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality can be debased and distorted by crass commercial exploitation of sex. *Nothing in the Constitution prohibits a state from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.* (Emphasis supplied.)

So too, here, where less than perfect data is available yet where also it is clear that saline abortions have catastrophic effects on maternal health, this court should hold the abolition of saline after the first trimester a reasonable regulation for purposes of maternal health.

X.

RECORD KEEPING AND REPORTING ARE PROPERLY REQUIRED

Sections 10 and 11 require the maintenance of certain forms to be promulgated by the division of health for the purpose of preparing reports to the division of health for the express purpose of "preservation of maternal health and life."

The statute is enabling legislation only authorizing the department of health to issue such forms as are necessary.

Since the forms are not yet in existence no issue exists about the nature of the information sought, but only about the power of the state to authorize the department of health to issue such regulations and provide for such forms.

The court below went directly to the heart of the issue finding such provisions constitutional:

> "Sections 10 and 11 pertain to the maintenance of abortion records. The acquisition of data is essential to the advancement of medical knowledge. These provisions establish reporting procedures for statistical purposes only, and require that the division of health ensure the confidentiality of all information. Nothing in these sections would serve to restrict either the abortion decision itself or the exercise of medical judgment in performing an abortion."

The Three Judge Federal Court in Pennsylvania recently faced the same issue and held the enabling legislation constitutional while cautioning that the regulations should not violate this Court's mandate in *Roe* v. *Wade:*

> From the record in this case and the statements of counsel in their post-trial brief, it is indeed open to question or not there is a real challenge by plaintiffs to this particular provision of the Act, and accordingly, whether there is a justiciable controversy presently before the Court in this regard. However, we consider plaintiffs' challenge to be that an act which authorizes the future adoption of regulations in this area is unconstitutional on its face, if it does not also provide that the regulations only apply to abortions performed after the first trimester. We do not believe that the provision in question is unconstitutional on its face, nor do we believe that it is inconsistent with

> either *Roe* or *Doe* in merely authorizing regulations. Of course, any regulations promulgated in the future must be consistent with the requirements of the Supreme Court. Accordingly, we declare Section 6(c) not to be unconstitutional on its face and deny plaintiffs' request for injunctive relief.

The cases cited in Plaintiffs' brief are totally inapposite since they do not involve enabling legislation but rather do involve health department regulations which violated *Roe* and *Doe* by a massive invasion of the first trimester. No case yet has held unconstitutional the state's power to merely authorize the issuance of regulations.

In addition, the Court in *Doe* v. *Bolton* specifically maintained as constitutional the statutory provision that a physician's judgment may be required to be reduced to writing. The Court said:

> "Specifically, the following portions of Section 26-1202(b) remaining after the District Court's judgment, are invalid:
>
> (1) Subsections (1) and (2).
>
> (2) That portion of Subsection (3) *following the words "(s)uch physician's judgment is reduced to writing."* (emphasis added.)

No one contests the validity of the state's power to authorize the health department to issue regulations in other areas which do not involve abortion.

This Court should not presume that the Missouri Health Department will issue regulations not in conformity with *Roe* and *Doe*. Since such regulations are not now in existence it is assuredly premature for this Court to even consider this issue and the constitutionality of the present enabling legislation should be upheld.

CONCLUSION

Dr. Eugene Diamond is Guardian ad Litem for the class of unborn children and unborn viable children. A holding that the State of Missouri is powerless to protect the lives of its viable children would have dire precedential consequences for those this amicus represents.

In addition, Dr. Diamond has been appointed to represent the classes of parents and spouses affected by the abortion decision in litigation pending in the Federal court for the Northern District of Illinois. A decision by this court that parents and spouses have no voice in or part of the abortion decision would immeasurably weaken the structure of the family.

Both amici, Dr. Eugene Diamond and Americans United for Life Inc. urge this court to affirm the court below as to Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11 and declare the same constitutional; these amici urge the court to reverse the court below as to Section 6(1) and declare said section constitutional.

Respectfully submitted,
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Attorneys for Amici
Dr. Eugene Diamond
Americans United for Life Inc.

Law Students Who Assisted in the Preparation of This Brief:

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All of John Marshall Law School in Chicago except for Mr. Marzen who is a student at Chicago Kent-Illinois Institute of Technology Law School, Chicago, Illinois.

CERTIFICATE OF SERVICE

I, the undersigned attorney for the Amici, Eugene Diamond and Americans United for Life, and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33, I have caused to be served true and correct copies of the foregoing Motion, Brief and Appendices of Amici Eugene Diamond and Americans United for Life Inc., upon each party required to be so served, by causing said copies to be deposited in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to The Honorable John C. Danforth, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, MO 65101; Frank Sussman, 7733 Forsyth Blvd., Suite 1100, St. Louis, MO 63105; Judith Mears, Yale University Law School, 127 Wall Street, New Haven, Conn. 06520 and J. Brendan Ryan, Circuit Attorney of the City of St. Louis, 1320 Market Street, St. Louis, MO 63103.

.....

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Chicago, IL 60602
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APPENDIX

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

CIVIL ACTION
No. 75 C 3975

RALPH M. WYNN, M.D.; JERZY JOZEF (George) BIEZENSKI, M.D., and MARVIN ROSNER, M.D.,
Plaintiffs,

vs

WILLIAM J. SCOTT, Attorney General of the State of Illinois; BERNARD CAREY, State's Attorney for County of Cook, Illinois; and JOYCE C. LASHOF, M.D., Director of the Department of Public Health of the State of Illinois,
Defendants,

and

CIVIL ACTION
No. 75 C 3981
(Related Case)

JOHN S. LONG, M.D., on behalf of himself and all others similarly situated; ILLINOIS ABORTION SERVICES COUNCIL, an Illinois not-for-profit corporation, and MIDWEST POPULATION CENTER, an Illinois not-for-profit corporation, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs

WILLIAM J. SCOTT, Attorney General of the State of Illinois; BERNARD CAREY, State's Attorney for County of Cook, Illinois; and JOYCE C. LASHOF, M.D., Director of the Department of Public Health of the State of Illinois,
Defendants.

ORDER

This matter having come on to be heard on the Petition of Eugene F. Diamond, M.D. to intervene and for his appointment as guardian ad litem, the Court having heard argument of counsel, having reviewed the affidavits and briefs;

It Is Hereby Ordered that the Motion of Eugene F. Diamond, M.D. to intervene in this cause is granted;

It Is Further Ordered that Eugene F. Diamond, M.D. is herewith appointed guardian ad litem (1) for the class of unborn viable children; (2) for the class of unborn children whether viable or not; and (3) for the class of children born alive as a result of legal abortions; for the purpose of representing these classes in this litigation;

It Is Further Ordered that Dr. Diamond's Motion to intervene on behalf of himself as a parent and for the class of parents who will be affected by the statute is granted;

It Is Further Ordered that Dr. Diamond's Motion for leave to intervene on behalf of himself as husband and spouse and for the class of husbands and spouses affected by the statute is granted;

It Is Further Ordered that Dr. Diamond is granted leave to file within ten (10) days a pleading on behalf of each of the classes he represents.

Ordered:

/s/ *Prentice Marshall*
/s/ *Alfred Kirkland*

12-2-75

APPENDIX B

LIST OF OFFICERS AND DIRECTORS
OF
AMERICANS UNITED FOR LIFE, INC.

OFFICERS

Chairman
PROF. GEORGE WILLIAMS

Vice Chairmen
MARJORY MECKLENBERG
PROF. VICTOR G. ROSENBLUM

Secretary-Treasurer
JOSEPH R. STANTON, M.D.

Executive Director
DAVID J. MALL

BOARD OF DIRECTORS
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Episcopal Diocese of California
Fellow - Ecumenical Institute
Collegeville, Minnesota
ERMA CLARDY CRAVEN
Minneapolis, Minnesota
PROF. EUGENE F. DIAMOND, M.D.
Pediatrics
Loyola University, Chicago
PROF. ARTHUR J. DYCK
Population Ethics
Harvard University

PROF. WILL HERBERG
Philosophy and Culture
Drew University
JOHN F. HILLABRAND, M.D.
Toledo, Ohio
DENNIS J. HORAN, ESQ.
Chicago, Illinois
MILDRED F. JEFFERSON, M.D.
Boston, Massachusetts
EDGAR G. KILROY, M.D.
Cleveland, Ohio
PROF. DAVID W. LOUISELL
Law
University of California
LORE MAIER
Toledo, Ohio
MARJORY MECKLENBURG
Minneapolis, Minnesota
KENNETH M. MITZNER, PH.D.
Los Angeles, California
DR. JACOB A. O. PREUS, President
The Lutheran Church—Missouri Synod
St. Louis, Missouri
HERBERT RATNER, M.D.
Child & Family Quarterly
Oak Park, Illinois
PROF. VICTOR G. ROSENBLUM
Law—Political Science
Northwestern University
JOSEPH R. STANTON, M.D.
Boston, Massachusetts
PROF. GEORGE H. WILLIAMS
Divinity—Church History
Harvard University

APPENDIX C

ILLINOIS HOUSE BILL 1851
ILLINOIS ABORTION LAW OF 1975

"Section 1. It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decision of the United States Supreme Court of January 22, 1973. Without in any way restricting right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that long-standing policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.

Section 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this Act shall be given the meaning ascribed to them:

(1) "First trimester" means the first twelve weeks of gestation commencing with ovulation rather than computed on the basis of the menstrual cycle.

(2) "Viability," that stage of fetal development when the life of the unborn child may be maintained outside the womb by natural or artificial life-supportive systems.

(3) "Physician," any person licensed to practice medicine in all its branches under the Illinois "Medical Practice Act."

(4) "Hospital" means a hospital licensed pursuant to the "Hospital Licensing Act" or specifically exempted from licensure under subsections (2), (3), or (4) of Section 3 of this Act.

(5) "Department" means the Department of Public Health, State of Illinois.

(6) "Criminal Abortion" means the use of any instrument, medicine, drug or other substance, whatever, with the intent to procure a miscarriage of any woman except when done by a physician in conformity with this Act. It shall not be necessary in order to commit a criminal abortion that the woman be pregnant, or if pregnant, that a miscarriage be accomplished.

Section 3. No abortion shall be performed prior to the end of the first trimester of pregnancy except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment;

(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given

and is not the result of coercion. The informed consent shall state that the woman has been informed of the following:

(a) The physical competency of the fetus at the time the abortion is to be performed, such as, but not limited to, what the fetus looks like, fetus ability to move, swallow, and its physical characteristics;

(b) The general dangers of abortion, including, but not limited to, the possibility of subsequent sterility, premature birth, live-born fetus, and other dangers; and

(c) The particular dangers of the procedure to be used.

Any physician who intentionally fails to inform the woman about to be aborted or who fails to secure a written informed consent as indicated herein, violates the provisions of this Act and commits a Class B misdemeanor.

Any violation of this Section shall be admissible in a civil suit as prima facie evidence of the physician's failure to obtain an informed consent:

(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life or health of the mother.

(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of 18 years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life or health of the mother.

Section 4. No abortion performed subsequent to the first trimester of pregnancy shall be performed except where the provisions of Section 3 of this Act are satisfied

and the abortion is performed in a hospital, on an inpatient basis, with measures for life support for the fetus which must be available and utilized, if there is any clearly visible evidence of viability.

Section 5.

(1) No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.

(2) When the fetus is viable no abortion shall be performed unless medically necessary to preserve the life or health of the mother and only after consultation with at least two other physicians not related to or engaged in practice with the attending physician.

Section 6.

(1) No person who performs or induces an abortion after the fetus is viable shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall intentionally fail to take such measures to encourage or to sustain the life of viable fetus or child, and the death of the viable fetus or the child results, shall be deemed guilty of a Class 2 felony.

(2) Whoever, with intent to do so, shall take the life of a premature infant aborted alive, shall be guilty of a Class 1 felony.

(3) No person shall use any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either

prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive.

Section 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the State under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.

Section 8. Any woman seeking an abortion in the State of Illinois, after viability, shall be verbally informed of the provisions of Section 7 of this Act by attending physician and the woman shall certify in writing that she has been so informed.

Section 9. The General Assembly finds that the method or technique of abortion known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first trimester of pregnancy.

Section 10. A report of each abortion performed shall be made to the Department on forms prescribed by it. Such report forms shall not identify the patient by name, but shall include, but not limited to, information concerning:

(a) Identification of facility where abortion was performed and date performed;

(b) The political subdivision in which the patient resides;

(c) Patient's date of birth, race and marital status;

(d) Number of prior pregnancies;

(e) Date of last menstrual period;

(f) Type of abortion procedure performed; and

(g) Complications.

Such form shall be completed by the hospital or other licensed facility, signed by the attending physician, and transmitted to the Department not later than 10 days following the end of the month in which the abortion was performed.

Abortions performed after a gestation period of 20 completed weeks shall be registered as provided in Sections 20 through 24 of the Vital Records Act.

The Department may prescribe rules and regulations regarding the administration of this Act including regulations relating to the information to be provided under Section 20 of the Vital Records Act.

All information obtained by a physician, hospital or ambulatory health facility from a patient for the purpose of preparing reports to the Department under this Section or reports received by the Department shall be confidential and shall be used for statistical purposes except where otherwise provided by law.

Section 11.

(a) A person who commits a criminal abortion is guilty of a Class 2 felony.

(b) Any person who advertised, prints, publishes, distributes or circulates any communication through print, radio or television media advocating, advising

or suggesting any act which would be a violation of this Act is guilty of a Class B misdemeanor.

(c) Any hospital, licensed facility or physician who fails to submit a report to the Department under the provisions of Section 5 of the Act and any person who fails to maintain the confidentiality of any records or reports required under this Act is guilty of a Class B misdemeanor.

(d) Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact an abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor.

Section 12. All tissue removed at the time of abortion shall be submitted for analysis and tissue report to a board eligible or certified pathologist as a matter of record in all cases. There shall be no exploitation of or experimentation with the aborted tissue.

Section 13. No physician, hospital, ambulatory surgical center, nor employee thereof, shall be required against his or its conscience declared in writing to perform, permit or participate in any abortion, and the failure or refusal to do so shall not be the basis for any civil, criminal, administrative or disciplinary action, proceeding, penalty or punishment. If any request for an abortion is denied, the patient shall be promptly notified.

Section 14. If any provision of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions or application, and to this end the provisions of this Act are declared to be severable.

Section 15. This Act shall be known and may be cited as the 'Illinois Abortion Law of 1975.'

APPENDIX D

TABLE TWO: Live Births After Saline Instillation, or Other (July 1–December 31, 1970)

	Date	Initial	Method	Weight	Gestation (weeks)	Lived
1	July 22	P	Saline	1 lb, 8 oz	22	2 hr
2	August 20	L	Hysterotomy	15 oz	22	30 min
3	August 21	B	Saline	2 lb, 14 oz	25	6 hr, 35 min
4	August 23	C	Saline	1 lb, 9 oz	24	2 hr
5	August 23	W	Saline	2 lb, 8 oz	28	Alive
6	August 23	L	Saline	3 lb, 1 oz	20	4 hr, 55 min
7	September 1	R	Ethodine	1 lb, 13 oz	18	5 min
8	September 4	M	Saline	3 lb	20	1 hr, 5 min
9	September 9	V (1 of twins)	Saline	1 lb, 13 oz	20	15 hr
10	September 17	A	Saline	2 lb, 1 oz	24	47 hr, 40 min
11	September 24	V	Catheter	1 lb	17	2 hr 20 min
12	September 30	L	Saline	3 lb, 5½ oz	30	53 hrs, 15 min
13	October 3	N	Saline	2 lb	26	7 hr, 15 min
14	October 8	W	Saline	8½ oz	16	5 min
15	October 9	S	Saline	1 lb, 10 oz	19	1 hr 35 min
16	October 11	G	Saline	1 lb, 7½ oz	21	5 min
17	October 17	D	Saline	2 lb, 3 oz	20	5 hr
18	October 18	G	Saline	1 lb, 4 oz	19	3 hr, 30 min
19	October 21	L	Saline	14 oz	19	1½ hr
20	October 26	S	Saline	3 lb, 6 oz	24	24 hr
21	November 9	G	Saline	1 lb 14 oz	26	17 hr
22	November 20	R	Saline	1 lb, 14 oz	18	6½ hr
23	November 23	F	Saline	1 lb	21	30 min
24	November 25	M	Saline	1 lb, 8¾ oz	21	1 hr, 30 min
25	December 2	S	Saline	1 lb	20	55 min
26	December 7	P	Saline	1 lb, 5½ oz	20	2 hr, 40 min
27	December 16	R	Saline	1 lb, 11½ oz	20	2½ hr

From: Pakter, et al., *Clinical Ob. Gyn.* Vol. 14, 1971 at page 290.

APPENDIX E

TABLE VII

SURVIVORS

	Weight	Gestational Age	Apgar	Initial Temp >35.5°C	PROM	HMD	RESP	APNEA	DQ*	ABN	Height %	Weight %
001	870	21	8	No	No	Yes	No	12 hr	B	Difficult exam§	25	10
009	710	23	7	No	Unknown dur	Yes	No	30 hr	A	Cong heart dis	10	10
012	850	24	5	Yes	6 days	No	No	15 hr	N	Spasticity low extrem	50	50
014	930	24	3	Yes	No	Yes	Yes	0 hr	N	Hydrocephalic RLF blind	50	50
017	740	24	4	Yes	2 days	No	Yes	96 hr	B	Difficult exam§ 0 blood sugar at birth	<3	<3
023	920	24	2	No	No	Yes	Yes	264 hr	N	RLF blind	50	50
027	908	26	7	Yes	10 days	No	No	No	N	Speech prob	10	10
028	999	29	Unknown	Yes	No	No	No	60 hr	B	Normal	10	10
029	999	22	6	Yes	No	Yes	No	10 hr	N	Normal	50	50
030	910	30	5	Yes	Unknown dur	No	No	30 hr	B	Normal	10	10
039	830	32	4	Yes	No	No	Yes	48 hr	B	Difficult exam§	3	3
066	999	30	6	Yes	Leaking 4 wks	No	No	No	N	Normal	3	3
081†	1000	32	4	Yes	3 days	No	No	No	N	Normal	—	—
087	840	31	7	No	Unknown dur	No	Yes	12 hr	A	TE fistula RLF blind	<3	<3
093†	840	29	8	Yes	30 hrs	No	No	48 hr	N	Hearing loss Hyperactive	—	—
096	940	28	7	Yes	No	No	No	No	N	Normal	3	3
100	680	28	Unknown	Yes	3 days	No	No	No		RLF Crib death	Dead 6 months	
124‡	980	32	1	No	No	No	No	33 hr	Dead		Dead 4½ months	
139	900	25	2	No	5 days	No	No	48 hr	N	Normal	50	50
146	865	25	6	Unknown	10 days	No	Yes	40 hr	B	RLF Poor vision	<3	<3
150	870	26	Unknown	No	No	No	No	72 hr	N	Normal	<3	<3
161	960	26	3	Yes	4 days	No	No	49 hr	N	Normal	10	10

* DQ corrected for prematurity at 10 months
‡ Discordant twin
† Exam at 10 months only for developmental exam
§ Difficult exam—difficulty in getting child's attention
N = *90-above*—Normal (N)
B = *70-89*—High abnormal to Borderline (B)
A = *69-below*—Abnormal (A)
‖ Height and weight not corrected for prematurity but represent last recorded figure after age 15 months

From: Alden et al. "Morbidity and Mortality of Infants Weighing Less Than 1,000 Grams in an Intensive Care Nursery" *Journal of Pediatrics* Vol. 50, No. 1 July 1972 pp. 40-48 at p. 46. Note that Baby #1 is listed at 21 gestational weeks, and Baby #9 is listed at 22 gestational weeks. Both survived; one had a difficult exam and one was normal.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, A MISSOURI CORPORATION, DAVID HALL, M.D., AND MICHAEL FREIMAN, M.D.,

Appellants,

v.

JOHN C. DANFORTH, ATTORNEY GENERAL OF THE STATE OF MISSOURI, AND J. BRENDAN RYAN, CIRCUIT ATTORNEY OF THE CITY OF ST. LOUIS,

Appellees.

No. 74-1419

JOHN C. DANFORTH, ATTORNEY GENERAL OF THE STATE OF MISSOURI,

Appellant,

v.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, A MISSOURI CORPORATION, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., AND J. BRENDAN RYAN, CIRCUIT ATTORNEY OF THE CITY OF ST. LOUIS, MISSOURI,

Appellees.

(Continued on inside front cover)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

BRIEF OF AMICUS CURIAE FOR UNITED STATES CATHOLIC CONFERENCE

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OCTOBER TERM, 1975

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

BRIEF OF AMICUS CURIAE FOR UNITED STATES CATHOLIC CONFERENCE

INTRODUCTORY STATEMENT

The facts of record in this case, the pertinent Missouri constitutional and statutory provisions, the provisions of the United States Constitution involved, and the opinions of the court below are set out in the briefs filed by the appellants and the appellees. This amicus accepts them for purposes of its own brief. Both parties have consented in writing to the filing of this brief amicus curiae by the United States Catholic Conference.

INTEREST OF THE AMICUS CURIAE

I.

Identification of the Amicus

The United States Catholic Conference is a nonprofit corporation and an agency through which the Catholic

Bishops of the United States collaborate with other members of the Church—priests, religious and laity—in areas where voluntary collective action on an interdiocesan and national basis can benefit the Church and society.

USCC is an agency of the Catholic Bishops of the United States. Its predecessor, established in 1919, was known as the National Catholic Welfare Conference. The prime purpose of USCC is to unify and coordinate activities of the Catholic people of the United States in programs and works of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, communications and public affairs, with emphasis on the preservation of religious liberty in America.

II.

Interest of the Amicus in These Cases

The issues presented in these cases profoundly affect the life of the family. The authority of parents over their children and the integrity of the marital relationship are concerns which affect the very fabric of society. It is the conviction of this amicus that matters of such fundamental import require consideration from all quarters. A spirit of service to the Court prompts this amicus to submit the arguments contained herein for the Court's consideration.

There is, further, a special interest of this amicus in the constitutional argument made by the petitioners regarding political divisiveness.

SUMMARY OF THE ARGUMENT

I.

VIABILITY

A. The petitioners have proposed a definition of "viability" which is not related to the life of the fetus. The definition urged upon the Court would ignore the capacity of the fetus for viability and turn solely upon the woman's length of pregnancy. Such a definition of viability defeats the state's compelling interest in the viable fetus.

B. A definition of viability cast in terms of the length of pregnancy removes from the abortion procedure any substantial exercise of medical judgment. The empirical data used to determine viability where the pregnancy standard is used will be supplied by the woman herself. The medical expertise cited as a basis for removing abortion procedure from state control will be entirely absent under such a standard.

C. The dispute over the definition of viability springs wholly from the decision in *Roe v. Wade* where the Court abandoned a biological definition of life and substituted a consensual standard regarding the term "human". This substitution means that the definition of life will shift with popular opinion.

D. The definition of life employed by the Court in *Roe v. Wade* subjects a protected constitutional right to the workings of an extra-judicial consensus. It is the purpose of the Bill of Rights and the Fourteenth Amendment to remove certain rights from such a process.

E. The theory of penumbral rights is grounded in acceptance of causal implication as legally significant. Failure of the Court to extend the right of life to the unborn child ignores the causal connection between the fetus and the child and is contrary to the just application of the penumbral theory.

F. The Court's failure to anchor its definition of life to biology has resulted in the petitioners' claim to a further revision of that definition. This process of redefinition can be expected to continue unless the Court abandons the decision in *Roe v. Wade*. The amicus respectfully urges the Court to resecure the definition of life to biology and to extend legal personhood to the unborn as a necessary application of the Fifth Amendment protection of life.

II.

PARENTAL CONSENT

A. The right of a minor to assert a constitutional claim in contradiction to that of a parent is not specifically at issue here. The petitioners position acknowledges that the minor alone cannot make the decision. The effect of the petitioners' claim is to supplant the parent with a third party stranger.

B. The state has an affirmative duty to support parents over third parties. This court has given parental authority a primacy that is rivaled only by the state itself. Parental authority is a fundamental right which must be respected by the state.

C. Petitioners claim that minors enjoy a parity of constitutional rights with adults is not supported by

law. In point of fact, this Court has repeatedly noted the child as being in a separate constitutional category from adults.

D. The constitutional rights of parents to control their children necessitate an application of due process guarantees to the extent that these rights cannot be cut off arbitrarily.

E. The life of the family is of great moment to the fabric of society. A decision which juxtaposes parent and child must inevitably work great social harm.

III.

SPOUSAL CONSENT

A. Right of privacy argued by the petitioners is essentially a familial right and must be considered in that context.

B. Marriage and the family have historically been viewed in an organic sense. Those entities have continually been held legally significant in their own rights. Duties running to and from marriage partners have long been imposed by the operation of law.

C. The state has not only an interest of its own in the marital relationship but may legally act to protect the interest of the marriage partner in that relationship. The interest of those partners has been deemed fundamental and consequently the state is under a special duty to support those rights.

D. The right to progeny has been deemed to exist to each partner in the marriage relationship. Further, that right has been seen as fundamental. Consequently, the state may lawfully legislate to effect protection of those fundamental interests.

IV.

The doctrine of political divisiveness is objectionable to the associational freedoms secured in the penumbra of the First Amendment. The amicus urges the Court to publicly disavow that doctrine.

ARGUMENT

I.

VIABILITY

INTRODUCTION

The Court in *Roe v. Wade*[1] held that certain forms of human life would not be protected by law. Here, the petitioners urge this Court to further reshape the boundaries of protected human life and thereby relieve them of important duties imposed by law. The issue of viability is wholly a product of the decision in *Roe v. Wade*, and the controversy presented here had its roots in that ruling. The petitioners ask the Court to refashion anew the concept of life. This amicus respectfully asks the Court to reject the petitioners' challenge and to abandon *Roe v. Wade*.

---

[1] Roe v. Wade, 410 U.S. 113 (1973).

A. PETITIONERS' PROPOSED DEFINITION OF VIABILITY IS NOT RELATED TO FETAL LIFE AND WOULD THEREFORE DEFEAT THE COMPELLING STATE INTEREST IN THE VIABLE FETUS.

The petitioners argue that the definition of viability contained in H.B. No. 1211 Section 2(2) is constitutionally impermissible. Further, they urge that viability be defined as a stage of pregnancy rather than as an attribute of the unborn child. A fair reading of the petitioners' argument indicates that the sole ground upon which they base their constitutional claim is the position that *Roe v. Wade* has required compelling state interest in prenatal life to comport with the stages of pregnancy rather than with the condition of the fetus.

The petitioners cite *Hodgson v. Anderson*,[2] *Doe v. Rampton*,[3] and *Planned Parenthood Association v. Fitzpatrick*[4] as requiring such a reading of *Roe v. Wade*.

As additional support for their position, the petitioners rely upon *Wolfe v. Schroering*. 388 F. Supp. 631. This reliance is misplaced, since that court said:

> "The court did not use the term 'third trimester' . . . The decision then is whether the decision (*Roe v. Wade*) flatly holds that viability occurs no sooner than 24 weeks and thus the state's interest is not compelling until then. We

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[2] Hodgson, et al. v. Anderson et al., 378 F. Supp. 1008 (D. Minn. 1974), appeal dismissed sub nom Spannaus et al., v. Hodgson et al., 420 U.S. 903 (1975).

[3] Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973).

[4] Planned Parenthood Association, et al, v. Fitzpatrick, et al., ____ F. Supp. ____ (E.D. Pa.(1975).

> think not. Viability is a condition in which the fetus 'presumably has the capability of meaningful life outside the mother's womb (Roe v. Wade, 410 U.S. at 163). Because the point at which viability may be ascertained varies, the state's interest in preserving the fetus also varies as to the time it becomes compelling." *Wolfe v. Schroering* 388 F. Sup 631 (W.D. Ky., 1974) at page 636.[5]

The court below has held that compelling state interest in viability is not bound by any trimester but rather attaches as the circumstance of each case requires and is viewed as an attribute of the fetus.

> "We do not think it is properly the function of the legislature or the courts to fix viability at an inflexible point in gestation. The time when viability is achieved will vary with each pregnancy, and the determination of whether a fetus is viable in a particular case must be left to the attending physician. Section 2(2) has precisely this effect."[6]

The petitioners' basic complaint, as we understand it, is that the medical judgments involved in determining viability are quite difficult. There is, however, no indication that the medical personnel do not understand what is required of them; consequently, the statute cannot be challenged for vagueness.

This Court is asked to refuse protection of law to a viable fetus which has not yet reached the 24th week of gestation. Pregnancy is, of course, a condition of the woman and is unrelated to those fetal attributes which determine its viability. To consider viability in terms of a condition of the woman is to establish a standard which is not connected with fetal development.

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[5] Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974) at p. 636.

[6] Planned Parenthood of Central Missouri, et al., v. Danforth, et al., 392 F. Supp. 1362 (E.D. Mo. 1975), enforcement stayed and enjoined 420 U.S. 918 (1975).

B. DEFINING VIABILITY IN TERMS OF PREGNANCY REMOVES MEDICAL JUDGMENT FROM DOCTOR'S PROVINCE.

Crucial to the *ratio decidendi* employed by the Court in the decision which removed the abortion procedure from state control was the ground that such a procedure involved the exercise of medical judgment. The Court found physicians entitled to immunity from state prosecution because of the necessity to make medically responsible judgments. The petitioners now ask this Court to free medical personnel ~~from~~ that very judgmental factor which contributed to the granting of immunity in the first instance. The petitioners' case is then the second step in a process in which, first, immunity is granted to physicians because of the requirements for their exercise of medical judgment; secondly, the requirement to make medical judgments is removed, leaving only the bare procedure and immunity therefrom.

According to the petitioners' view, a pregnant woman would report the date of her last menstrual period and this report would fix the viability of the fetus. Any layman able to use a calendar would be able to judge viability.

The insistence that viability cannot date prior to the end of the second trimester of pregnancy is to make the calendar the measure of viability rather than the actual condition of the unborn child. Such a criterion calls into question the object of the state's compelling interest. If the object of that compelling state interest is the protection of the life of a fetus capable of living outside the womb, then that interest would be defeated by the use of an arbitrary measure, such as a calendar date.

C. PRESENT CONTROVERSY IS A PRODUCT OF THE DECISION IN *ROE V. WADE* TO ABANDON A BIOLOGICAL DEFINITION OF LIFE AND THE SUBSTITUTION OF "SOCIOLOGIC" STANDARDS.

The issue of viability and the petitioners' challenge to Missouri Bill 1211 are products of *Roe v. Wade* and can only be understood as such. That decision is marked by many inner tensions and inconsistencies but nowhere is that tension or inconsistency greater than in the Court's view of unborn life. The dynamic which shapes the present controversy flows directly to the Court's treatment of prenatal life in *Roe v. Wade.*

The principal source of difficulty is that the Court in *Roe v. Wade* created the category of "potential life". This is a distinction which does not exist biologically. The human fetus is, according to all life science, a human life from the onset of conception. Biologically, it is not potential human life; it is actual human life in its earliest form. The human fetus is unquestionably alive; it cannot be characterized as anything less than human. *Byrn v. New York City Hospital,* 42 N.Y. 2d 194-199 (1972).

The Court's use of the expression "potential human life" indicates a rejection of biological criteria. That rejection ignores the causal link of the fetus of the unborn to the born. Without any explanation, the Court has deemed the fetus as merely being prior in time to a child. Such a view is reminiscent of Collingwood's observation regarding John Stuart Mill's theory of causality:

> "If you cut out the category of cause . . . you are cutting out the idea of necessary connection and

> trying to content yourself with the mere human succession, that is, you are attaching cause to empiricism such as John Stuart Mill for whom a cause simply is an antecedent and for whom consequently all knowledge is observation of fact devoid of any apprehension of necessity."[7]

The Court's treatment of fetal life is very much in line with Mill's view of cause. The decision in *Roe v. Wade* is absent of any recognition of biological connection between unborn and born. There is no recognition of the necessary or causal connection of one to the other.

The Court's rejection of biology as a criterion is accompanied by substitution of what might be termed a sociological or normative definition of "human". This substitution is crucial as it provides the rationale of the entire holding. Fetal life can only be "potential" human life if one accepts a view that human biologic life is insufficient to be "human". Thus, the decision in *Roe v. Wade* is saved from irrationality by the recognition of a definition of human life that rejects life science and recognizes as life only that which the societal consensus can agree is human.

The Court's reference to the indecision of various segments of our society as to the beginning of human life does not reflect any confusion in the life science community. There, the consensus is uniform that the fetus is a human being, a member of the human species which is living. The confusion spoken of by the Court lies with the application of descriptions which various groups utilize to establish norms for the recognition of other groups. It is, we submit, far from clear what

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[7]R. G. Collingwood, *The Idea of Nature*, Oxford University Press (1945), reprint 1970, p. 163.

probitive value can be attached to the exaltation of a mere description of behavior over the biologic criterion.

D. DEFINITION OF LIFE SUBJECT TO SOCIOLOGIC CONSENSUS CONTRARY TO PROVISIONS OF THE BILL OF RIGHTS AND FOURTEENTH AMENDMENT.

The Court's use of normative definitions of "human" must be considered in light of one of the aspects of real genius of the United States Constitution. That document removes certain civil rights from the workings of the popular will. Control over certain matters is taken from the various branches of the United States government and from the states by the Bill of Rights and the Fourteenth Amendment respectively. Chief among these civil rights is the right to life, which must not be taken away without due process of law. The right to take a life must, under our constitutional system, be a public right exercised under the most rigid controls of due process. Furthermore, the right is fixed in the Constitution and may not be altered by popular consensus, legislatively manifested or otherwise. Thus, a statute which repealed homicide laws would be unconstitutional since it would remove the protection of life from the public sector and locate it in the private sector. Authority for such laws is not founded on any sociological data relating to homicide. Rather, it springs from the constitutional protection of life.

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish

them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[8]

The effect of the decisions in *Roe v. Wade* and *Doe v. Bolton* is to endanger civil rights in precisely the way the Constitution was designed to prevent. Those decisions subordinate a protected right to the caprice of societal evaluation. Constitutional guarantees of due process are removed and made subject to an extra-legal system or normative rather than biologic fact. The popularity of a given norm will govern its applicability to the law. *Roe v. Wade* uniquely opens a protected constitutional right to the workings of the popular will.

It is human life that is guaranteed by the Constitution, not "the quality of it". The determination of "quality" is inherently subjective and affords the overwhelming discretionary authority which has been condemned by this Court in many other instances.[9]

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[8]West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943).

[9]Discretion of this type frequently yields to the bias of the subject. This problem is well evidenced by the recent action of the American Congress of Obstetricians and Gynecologists. That body refused to enclose a brief amicus curiae in the appeal of the case involving Dr. Kenneth Edelin because "the express statement of an adversary relationship to the fetus is not consonant with the traditional role of the fellows of the college." These doctors treat two patients when they deal with a pregnant woman and do not want to be compelled to prefer one over the other. Ob. Gyn. News, Dec. 15, 1975.

The *Roe-Doe* majority has acted to alter the substance of the constitutional guarantees to life by way of a redefinition of the term "human" to restrict that term to those able to pass the muster of "meaningful" life. The Court's rejection of the traditional biological criterion has significantly altered the Fifth Amendment guarantees to a point where more than biologic life is required to invoke them. The Court's use of the ambivalent and universally subjective term "meaningful" must excite speculation as to how much more might be required to invoke these guarantees. In any event, it is clear that all protected life, after born included, is now subject to the inchoate consensus among undefined groups as to what is "human".[10]

E. FAILURE OF THE COURT TO EXTEND LEGAL RIGHTS TO THE UNBORN CHILD IS CONTRARY TO THE JUST APPLICATION OF PENUMBRAL THEORY.

Coincidental with the Court's rejection of a biologic criterion for human life, the majority in *Roe v. Wade* found that the unborn child lacks legal personhood. The language of the petitioners' brief indicates that the rejection of legal personhood flowed from recognition of the absence of the necessary "human" attributes. Such a position ignores the fact that the category of legal personhood is not coeval with any "human" characteristics. Legal personhood is and has for some

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[10]Roe v. Wade, *supra*, p. 159.

time been recognized in respect to objects such as ships and corporations.

> "The world of the lawyer is peopled with inanimate right-holders; trusts, corporations, joint ventures, municipalities, Subchapter R partnerships, and nation-states, to mention just a few. Ships, still referred to by the courts in the feminine gender, have long had an independent jural life, often with striking consequences. We have become so accustomed to the idea of a corporation having 'its' own rights, and being a 'person' and citizen for so many statutory and constitutional purposes, that we forget how jarring the notion was to early jurists. 'That invisible, intangible and artificial being, that mere legal entity' Chief Justice Marshall wrote of the corporation in *Bank of the United States v. Deveau*—could a suit be brought in *its* name? Ten years later, in the Dartmouth College case, he was still refusing to let pass unnoticed the wonder of an entity 'existing only in contemplation of law'."[11]

The granting of legal personhood in such instances is, we submit, properly the product of a constitutional analysis which recognizes the existence of rights which must be said to be implicit in other, more explicitly protected rights. That process of analysis which found these rights residing in the penumbra of others operates on acceptance of a causality which recognizes the force of a necessary implication. The right to property guaranteed in the Constitution carries with it the implication that the causal connection between a business organization and the contractual relationships

[11]Stone, Christopher, *Should Trees Have Standing*, Kaufman 1972, p. 5.

that flow therefrom imply a legal significance great enough to provide that "invisible, intangible, and artificial being"[12] with legal personhood.

Recognition of the legal significance of such causal implication is not limited to personification of business organizations. The process used to reach the penumbral rights enunciated in *Griswold v. Connecticut*[13] is the self-same recognition of necessary implication. Penumbral rights are, quite simply, those rights which must be recognized because they are necessarily implied in an explicitly protected right.

The penumbral process which recognized rights such as those found in *Maynard v. Hill*,[14] *Meyer v. Nebraska*,[15] *Pierce v. Society of Sisters*,[16] and *Griswold v. Connecticut*,[17] as well as those found in *Loving v. Virginia*,[18] *Skinner v. Oklahoma*[19] was rejected by the majority in *Roe v. Wade* when it refused to protect fetal life, even though such life is a necessary, not coincidentally antecedent, connection to the lives of all those "persons" protected by explicit direction of the Constitution.

There is irony in the fact that the majority in *Roe* not only failed to use the penumbral process with

[12]*Ibid.*, p. 5.

[13]Griswold v. Connecticut, 381 U.S. 479 (1965).

[14]Maynard v. Hill, 125 U.S. 190 (1888).

[15]Meyer v. Nebraska, 262 U.S. 390 (1923).

[16]Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[17]Griswold, *supra*, n. 13.

[18]Loving v. Virginia, 388 U.S. 1 (1967).

[19]Skinner v. Oklahoma ex rel Williamson, 316 U.S. 535 (1942).

respect to fetal life, but also misapplied it with respect to the pregnant woman. The right to life is explicitly protected in the Fifth and Fourteenth Amendments and the existence of fetal life is necessarily implied in that protected right. A fetus is not a "different being" from a human being. Every human being born is the "same being" at a different state of development from his/her fetal stage. Our continuous existence is not dependent upon normative standards – our existence is assured at the biologic level by the same kinds of internal stimuli and reactions throughout our temporal development. The human element cannot be divorced from *zöos*. There can be no "human" life without human fetal life.

The Mill-like view of the causal relationships between the unborn child and the born adopted by the *Roe* majority and the Court's concommitant rejection of the biologic criterion of life are also accompanied by a rejection of the penumbral process which would lead to the recognition of legal personhood. Can it be said that the liberty of the Fifth and Fourteenth Amendments *necessarily* implies a right to abortion? Implication, it should be noted, is not the same as inference. A thing is implied because of the logical necessity, which may not be perceived, that it be so. Is there really a necessity that liberty encompass a private right to end the life of a human fetus.

F. PETITIONERS' CHALLENGE TO VIABILITY OR AS AN ATTRIBUTE OF FETUS CONSTITUTES A SHIFT IN CONCEPTION OF PROTECTED LIFE. UNLESS THE COURT ABANDONS ROE V. WADE IT MUST CONTINUE TO REDEFINE LIFE.

From the foregoing it is clear that the concept of viability as enunciated in the decision of *Roe v. Wade* is at once a confirmation and a denial of the human existence of the unborn child. It is a fundamental contradiction.[20] The rejection of the necessary relation of fetus to child has placed the Court in an ambiguous posture in its stand regarding "potential life".

The Court in *Roe v. Wade* made a good faith attempt to perceive the societal or normative consensus regarding the quality of life to be recognized as human. The majority there acted on the perception that a viable fetus would be accepted as "human" enough to warrant state protection of that life.

The position espoused by the petitioners herein represents at once both a shift away from the view of "human" perceived by the Court in *Roe* and *Doe* and

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[20]The Federal Rules of Evidence require, pursuant to Rule 201, that only adjudicative facts which are indisputable may be subject for judicial notice. While the federal rules were not in force at the time of the ruling, the doctrine which they express regarding judicial notice was well established. It is quite difficult to view the *Roe* decision as not having an adjudicative quality, as that holding relates to fetal life. Curiously, the judicial notice of legislative facts has limited the ability of the "disputed" facts regarding fetal life to be an adjudicative concern. See Davis, *Judicial Notice*, 55 Col. L. Rev. 945, 952 (1955).

also is an example of the danger of allowing protection of human life to become a matter for societal definition. The Court's perception of the acceptability of a viable fetus as human has been rejected by the petitioners. That very act of rejection should be sufficient to alarm the Court to the danger to constitutional guarantees posed by the rulings of *Roe* and *Doe*.

The Court's definition of life is not anchored to biology. It is likely therefore that the abandonment of biological life as a criterion of Fifth Amendment protection will continue in the future to subject the Court to numerous redefinitions of the term "human".

Further, it should be obvious that the use of the normative mechanism to determine the definition of "human" will not be limited to the fetus. In point of fact, redefinition of that term is already under way, respecting both ends of the life process. Already there are indications that some see children afflicted by Tay-Sachs Disease or Downs Syndrome as, perhaps, not falling within the consensus of "human".

In summary, we urge the Court to accept the Fifth Amendment and Fourteenth Amendment as removing the right to life from the working of any societal consensus. Further, we urge the Court to recognize and accept the necessary implication which prenatal life has for all life, and to extend legal personhood to the unborn as a necessary implication of the Fifth Amendment protection of life.

II.

PARENTAL CONSENT

A. MINOR'S RIGHTS NOT AN ISSUE. PETITIONER SEEKS TO SUPPLANT PARENT WITH THIRD PARTY.

The record in this case indicates that the abortion clinics involved here routinely maintain counselling sessions which take place before the abortion procedure. The stated purpose of these sessions when a minor is involved would include, *inter alia*, a determination of the intelligence and maturity of that minor. Testimony for the petitioners indicates that not all minors can be considered capable of giving informed consent.[21] There is evidence in the record that the clinic would not go forward unless one of its employees was satisfied that the minor was sufficiently mature to make the requisite decision.

> "Q. In the event that an unmarried minor patient under the age of eighteen could not obtain parental consent for the reason that neither parent was available, such an an orphan, would you still require the consent of a person standing in loco parentis?
>
> A. Yes.
>
> Q. In the event that one could legally give her own consent, would you require the consent of one parent?
>
> A. It would not be required. It would be handled on an individual basis.

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[21] Testimony of Judith Widdicombe on direct examination p. 164 of the Record.

Q. What would be the factors of *your* determination?

A. A number of factors, the girl's maturity, the level of decision making, her ability to carry through with the procedure, any extenuating circumstances that might exist.

Q. Would her education be a determining factor?

A. Possibly.

Q. Her intelligence?

A. Yes.

Q. In summation, would it be fair to say that *you* would base each individual case on its own merits using all these factors to *determine* whether or not the consent she was giving was informed?

A. Correct." (emphasis supplied)[22]

It is clear, then, that an abortion clinic employee not the minor herself will make the determination as to whether or not the child in question is sufficiently mature and intelligent to perceive the implications of her actions. The petitioners have urged that this Court must, by force of law, remove the parents from making that determination and replace those parents with a stranger.

Although the petitioners claim to advance the right of minors to make the abortion decision, the effect of the petitioners' argument is to substitute the abortion counsellor for the child's parents. The sweeping libertarian language employed boils down to the position that the lifelong intimacy of the parent-child relationship ought to be thrown over for forty minutes

[22]Direct testimony of Judith Widdicombe on direct examination, p. 152-153 of the Record.

of counselling by a stranger, a stranger who in fact has an *economic* and *ideologic* interest in the decision in question.[23]

According to the petitioners' view, the presumption of incompetency by minority must be replaced with a presumption of competency subject to the discretion of the clinical personnel. This amicus must submit that the legislature of the state of Missouri has a constitutional right to select who is going to make the quasi-judicial decision of competency and secondly that the state of Missouri has a duty to prefer the parent over a stranger.

The petitioners do not even challenge the authority of the state to determine competency. The state has long exercised the power to define incompetency, as well as the qualifications of those permitted to act for the incompetent. See 475.055 VAMS. There is no rationale offered by the petitioners to suggest a constitutional theory which would make a stranger more suitable a judge of competency than the parents.

There is, on the other hand, a long history of rulings by the Supreme Court which outline the duties of the state to the parent. These cases leave little doubt that the state has a duty to support the parent over all others. Yet the substance of the petitioners' demand is that the legislative placement of this decision making in the parents rather than in some stranger is constitutionally impermissible.

Throughout its history the Superme Court has repeatedly confirmed the primacy of parental control of

[23]Nathanson, B., M.D., former director of a large abortion clinic, has noted that the counseling function fell to "narrow partisanship of committed young women who have had abortions and who typically staff the counselor ranks of hospitals and clinics now". 291 New England Journal of Medicine 1189 (Nov. 1974).

the family unit. The state's relationship with the parents is governed by cases in the line of *Meyer v. Nebraska*[24] and *Pierce v. Sisters,*[25] including among others *Ginsberg v. New York*[26] and *Wisconsin v. Yoder.*[27] These cases place the interest of the parents in the rearing of their children in priority to state interest. In *Pierce v. Sisters, Meyer v. Nebraska,* and *Wisconsin v. Yoder,* the Court affirmed the responsibilities naturally placed upon the parents for the support, rearing and nurturing of their children and recognized that those responsibilities carry with them an inherently requisite authority. The rights of parents to the exercise of their authority is considered fundamental and only a compelling interest by the state can overcome it. *Wisconsin v. Yoder.*

> "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[28]

The petitioners have not suggested what state interest is served by the state's substitution of a third party for the parents in the decision-making process. There is, we suggest, no constitutionally permissible ground for the state to make such a substitution. Further, the novel claim that the practice of medicine, though a privilege

[24]Meyer v. Nebraska, *supra,* n. 15.

[25]Pierce v. Society of Sisters, *supra,* n. 16.

[26]Ginsberg v. New York, 390 U.S. 629 (1968).

[27]Wisconsin v. Yoder, 406 U.S. 205 (1972) .

[28]Ibid, p. 232.

licensed by the state, is an activity protected by the First Amendment is insufficient to alter the state's responsibility to the parents. The petitioners' position is analogous to claims advanced in *Mercer v. Michigan*;[29] where parental authority over children was attacked by a school teacher seeking to substitute his rights for those of the parents. The decision in the three-judge court rejected *inter alia* the claim that parental authority could be overruled by third party rights. This holding was affirmed upon appeal to the Supreme Court.[30]

B. STATE HAS AFFIRMATIVE DUTY TO SUPPORT COURTS

Beyond the state's interest in the determination of incompetency lies the policy consideration which grounds the state's interest in preserving parental authority. *Meyer v. Nebraska*[31], *Pierce v. Society of Sisters*[32], *Wisconsin v. Yoder*[33], *Griswold v. Connecticut*[34], *Loving v. Virginia*[35], *Skinner v. Oklahoma*[36], and *Boddie v. Connecticut*[37], all accept what can only be

[29]Mercer v. Michigan, 379 F. Supp. 580 (E.D. Mich. 1974), affirmed 419 U.S. 1081 (1974).

[30]Ibid.

[31]Meyer v. Nebraska, *supra,* n. 15.

[32]Pierce v. Society of Sisters, *supra,* n. 16.

[33]Wisconsin v. Yoder, *supra,* n. 27.

[34]Griswold v. Connecticut, *supra,* n. 13.

[35]Loving v. Virginia, *supra,* n. 18.

[36]Skinner v. Oklahoma, *supra,* n. 19.

[37]Boddie v. Connecticut, 301 U.S. 371 (1971).

described as an organic view of the family and social relationships attendant thereto. These cases accept, as a premise, the view that the family is something more than the sum of its aggregate members. Within this, tradition, the cases of *Pierce v. Society of Sisters*, *Meyer v. Nebraska*, and *Wisconsin v. Yoder*, not only confirm the Court's recognition of the organic view of the family but also the state's need and, in fact, duty to give protection and support to the familial undertaking. Though the Court has traditionally treated marriage and family as being coeval, the organic view remains. A more strict view of the organic conception of society is manifested by *Stanley v. Illinois*[38]. That decision is witness to the fact that the state's obligation to the family extends to *de facto* as well as *de jure* families. The significance of this view of the family is evident in the remarks of Justice McReynolds in *Pierce v. Society of Sisters:*

> "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[39]

Set over and against this organic view of the family is an individualistic or contractarian view of familial relations argued by the petitioners and found in *Eisenstadt v. Baird*[40]. In our judgment, it is aberrational and eschews the entire history of the family before the Court.

Seven justices participated in the *Eisenstadt* decision, six supported the holding. Of that six, three justices

[38]Stanley v. Illinois, 405 U.S. 645 (1972).

[39]Pierce v. Society of Sisters, *supra* n. 16 at p. 573.

[40]Eisenstadt v. Baird, 405 U.S. 438 (1972).

concurred in the opinion for the majority, one concurred specially and two concurred only in the result. The language describing marriage did not directly relate to the holding and in view of the fact that only three of the justices concurred in that language, it is clear that the *Eisenstadt* decision cannot be considered authority to set against the weight of the many cases which deal with marriage and the family in the organic sense.

In order to adopt such a view of society, it is necessary for one to ignore the interactions of family members and causalities which affect each family member. The individual much exalted in the *Eisenstadt* opinion does not exist in our society and never has. Such an individual is an abstraction. She has no kith nor kin, she comes from nowhere, her life is not affected by her past and she has no future. She exists only in an eternal present. It is a descriptive view of the relationship rather than a dynamic view, just as the relationship between the unborn child and the post-natal child has been viewed.

The rule of *Meyer v. Nebraska*[41], did more than establish constitutional recognition of parental control of children. It also rejected a view of the family as individual integers:

> "For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide:
>
> "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. * * * The proper officers will take the offspring of the good parents to the

[41]Meyer v. Nebraska, *supra* n. 15.

pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.'

In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institution rest."[42]

Judge McReynolds further notes:

"... it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution."[43]

C. MINORS' LEGITIMATELY SEPARATE CONSTITUTIONAL CATEGORY. PETITIONERS' CLAIM OF PARITY NOT SUPPORTED BY LAW.

The weight of the cases affirming both an organic view of the family and the primacy of parental authority is matched by the precedental support of the concept that adults are a separate constitutional category apart from minors. The petitioners argue that children have constitutional rights coeval with adults. This parity of constitutional rights which the petitioners suggest is the law of the land does not, in our opinion,

[42]Meyer v. Nebraska, *supra* n. 15 at 627.

[43]Ibid, p. 628.

exist. The line of cases which purportedly uphold this view, such as *In re Gault*[44], *In re Winship*[45], *Goss v. Lopez*[46], and *Wood v. Strickland*[47], are essentially Due Process clause cases and deal with the issue of whether or not children are entitled to the basic fairness embodied in the concepts of due process. Such a position is far from that proposed by the petitioners. In *Ginsberg v. New York*, the Court clearly indicated the view that minors are to be considered in a different constitutional category than adults.

"That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults * * *.'" *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 170, 64 S. Ct. 438, 444, 88 L. Ed. 645.[48]

This Court has never ruled that all constitutional rights of adults are available to minors. In point of fact, *McKeiver v. Pennsylvania* clearly illustrates the principle of distinction which the Court has utilized in dealing with minors.

"The Court, however, has not yet said that *all* rights constitutionally assured to an adult accused of crime also are to be enforced or made available to the juvenile in his delinquency proceeding."[49]

[44]In re Gault, 387 U.S. 1 (1967).

[45]In re Winship, 397 U.S. 358 (1970).

[46]Goss v. Lopez, 419 U.S. 565 (1975).

[47]Wood v. Strickland, 420 U.S. 308 (1975).

[48]Ginsberg v. New York, *supra*, n. 26.

[49]McKiever v. Pennsylvania, 403 U.S. 528 (1971).

Thus, it should be obvious that petitioners' assertion of a parity of minors "rights" with those of adults is without precedental support. More specifically the Court has never said that children have rights which may be juxtaposed to those of their parents.

It follows that the organic view of the family supported by the Court's historical treatment of that institution requires that parental authority be favored over the wishes of minors. In point of fact the most dire circumstances have been required before the Court would remove the parents from control of their children. The blood transfusion cases are manifest of the extent of judicial support of parental authority. Such cases also stand for the proposition that abuse limits every right, no matter how favored in law[50] .

D. THE EXISTENCE OF THE CONSTITUTIONALLY PROTECTED RIGHTS OF PARENTS NECESSITATES APPLICATION OF DUE PROCESS GUARANTEES.

We should also note that the *Meyer v. Nebraska*[51] line of cases, in addition to the limitation upon the state's action against parental rights in a substantive sense, is also significant as a recognition by the state of the existence of parental rights. Thus, the constitutional guarantees of due process which require a hearing before any substantial interest is cut off are an element to be considered.

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[50]Jones v. President and Directors of Georgetown College, Inc., 331 F.2d 1000 (1964), cert. denied 377 U.S. 978 (1964).

[51]Meyer v. Nebraska, *supra* n. 15.

Fuentes v. Shevin holds that the presence of constitutionality cognizable rights necessitates a hearing before these can be cut off.

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' "[52]

The rights of parents to state support of their role has been deemed fundamental and cannot be overturned without a compelling state interest. See *Wisconsin v. Yoder*[53]. Thus, it is impossible to reconcile the petitioners' argument with the requirements of due process. The petitioners would have parental rights universally disregarded without so much as a hearing. It is remarkable that the petitioners' arguments relating to Section 7 of Bill 1211 do not have any relevance to the argument made in regard to Section 3, Subsection 4.

The argument made by petitioners with respect to Section 7 challenges the constitutionality of termination of parental rights where a fetus has survived an abortion. The petitioners urge the Court to the view that the fact that the putative parents made an intentional attempt on the life of the yet unborn child is not in and of itself sufficient to warrant termination of parental rights. The petitioners urge the Court that parental rights are of such magnitude that the state must hold a hearing to resolve the question. How is it possible for these rights, which the petitioners see as being too great as to require such a macabre turn of events, to be universally cut off without any hearing?

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[52]Fuentes v. Shevin, 407 U.S. 67 (1972).

[53]Wisconsin v. Yoder, *supra* n. 27.

The position of the state is, we submit, more than one of neutrality. The state has an affirmative duty to support those constitutional rights which have been recognized to reside in the parents. The state cannot at once recognize the duties, responsibilities and rights of parents as fundamental and at the same time deny a parent any protection to those rights by way of due process.

III.

SPOUSAL CONSENT

A. RIGHT OF PRIVACY IS ESSENTIALLY A FAMILIAL RIGHT

A resolution of the issues presented by petitioners' challenge to the spousal consent provision of Section (3)(3) of the Missouri statute must ultimately turn on the Court's view of the nature of the institution of marriage. In the words of Justice Appleton, in *Maynard v. Hill:*

> "It is not then a contract within the meaning of the clause of the constitution which prohibits the impairing of the obligation of contracts. It is rather a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress."[54]

[54]Maynard v. Hill, *supra*, n. 14 at p. 730.

Petitioner has argued that control over pregnancy resides solely in the woman and that the requirement for consent of the spouse would be constitutionally impermissible and an intrusion upon the woman's right of privacy. The proposition advanced by the petitioners, that the right of privacy is individualistic in nature, eschews the entire history of that penumbral right.

The court noted in *Paris Adult Theatre I v. Slaton,* 413 U.S.44, p.66, n.13: "the right is functionally related to family, marriage, motherhood, procreation and child-rearing." It is significant that the cases leading to *Griswold v. Connecticut*[55] and cited therein as authority are the same ones that support the organic view of the family, e.g. *Meyer v. Nebraska,*[56] *Pierce v. Society of Sisters.*[57] Thus the court's doctrine of privacy flows from a theory of the special nature of the family. According to the petitioners' view family is simply an aggregate of its members and marriage a bare contract. Thus we are faced with a situation where once having arrived at a doctrine of privacy *through* the legal protection of the family, the Court is now asked to "pull up the ladder" and utilize familial privacy to arrive at a doctrine of complete individual autonomy in familial affairs. The petitioners seek to cut away the root of the right of privacy. One might ask what remains of the doctrine of privacy after the concept of the organic marital and familial relationships are discarded – obviously, only a bare shell. The effect of removing the husband by force of law from any significant decision affecting the marriage is to take

[55]Griswold v. Connecticut, *supra*, n. 13.

[56]Meyer v. Nebraska, *supra*, n. 15.

[57]Pierce v. Society of Sisters, *supra* n. 16.

control of that decisional process from the private sector and place it in the public sector. The object of that section of the Missouri statute is to keep the decision-making process within the family.

B. MARRIAGE HAS BEEN VIEWED AS A LEGALLY SIGNIFICANT ENTITY, RATHER THAN A MERE ASSOCIATION

The Supreme Court has, throughout its history viewed marriage as something other than a mere association of individuals. In *Maynard v. Hill*, Justice Field stated:

> "It is also to be observed that, while marriage is often termed by text writers and in decisions of courts as a civil contract, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization, it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, it is the foundation of the family and of society, without which there would be neither civilization nor progress."[58]

[58]Maynard v. Hill, *supra*, n. 14, p. 729.

The relationship between the marriage partners has, in the eyes of the law, a significance all its own. Once the parties freely enter that relationship, they take upon themselves duties which do not bind single people. Further, the state has an interest in that relationship itself. The relationship is, according to Mr. Justice Story's view:

> ". . . something more than a mere contract. It is rather to be deemed an institution of society founded upon consent and contract of the parties, and in this view it has some peculiarities in its nature, character, operation, and extent of obligation different from what belong to ordinary contracts. *Maynard v. Hill.*[59]

This social institution is one of signal import which the state has a duty to protect and strengthen. (See *Skinner v. Oklahoma, Loving v. Virginia.*)[60] Further, the constitutional authority of the state to act to strengthen the family is well settled. In *Labine v. Vincent*, 401 U.S. 532 (1970) the court noted:

> "The power to make rules to establish, protect and strengthen family life . . . is committed by the Constitution to the legislature of . . . (the) State . . . . It is for that legislature, not the life-tenured judges of this Court, to select from many possible laws." (See also *Williams v. N. Carolina.*)[61]

[59]*Ibid.*, p. 731.

[60]Skinner v. Oklahoma, *supra*, n. 19; Loving v. Virginia, *supra*, n. 18.

[61]Labine v. Vincent, 401 U.S. 532 (1971) at p. 539-40; Williams v. North Carolina, 317 U.S. 287 (1942).

C. STATE HAS AUTHORITY TO PROTECT INTEREST OF MARRIAGE PARTNERS IN THAT RELATIONSHIP

Beyond the Court's recognition of the organic nature of marriage, and the state's interest in that institution lies the import which that state has for the partners themselves. The right to marry and the right to procreate have both been held to be fundamental personal rights. (*Skinner v. Oklahoma*). The whole fabric of domestic relation law is witness to the rights which each marriage partner has in the relationship. As Justice Douglas noted in the Court's opinion in *Skinner v. Oklahoma*: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[62]

There can be no doubt, then, that every spouse has a legally cognizable interest in the marital relation to which he is a partner. Further, it is clear that the spouse has an interest in matters relating to procreation. So pervasive is the acceptance of this concept that there exists a widely accepted presumption that a child born in wedlock was sired by the spouse. Yet the petitioners urge the Court to view the spouse as not related to his wife's pregnancy. It is ironic indeed that the spouse, according to petitioners' view, has no interest in either the fetus or his wife and yet may legally be compelled to support both.

Here again we find the petitioners using that same descriptive technique which avoids all implications of any interaction between these parties. There is no dynamism in the petitioners' view of the marital

[62]Skinner v. Oklahoma, *supra*, n. 19 at p. 541.

relationship. Rather, we are given a picture of two individuals having only a nominal interest in each other's activities, including procreation.

This view of marriage is, as we have noted above, not favored by law. The concept of marriage as an aggregate of two individuals is found in *Eisenstadt v. Baird*.[63] This case lies outside the mainstream of U.S. Constitutional history. More importantly, the pronouncement upon the nature of marriage contained in that decision and alluded to by the petitioners was not relevant to the holding there and cannot be said to overcome the long-standing view of marriage expressed in *Maynard v. Hill*,[64] and *Williams v. North Carolina*.[65] In point of fact the question of the nature of marriage was not before the Court in that case and the *dicta* relating to the marital state can only be described as being wholly gratuitious.

D. RIGHT TO PROGENY IS FUNDAMENTAL AND STATE MAY LAWFULLY PROTECT THAT RIGHT

The decision in *Stanley v. Illinois*[66] is convincing authority that a man has legally cognizable interest in his progeny. That interest was deemed to be at least as fundamental as the woman's. Surely such a fundamental right is not extinguished because the child is *in utero*. The right to procreation can only be a conjugal, not an individual, right. If any individual is deemed to have an

[63]Eisenstadt v. Baird, *supra*, n. 40.

[64]Maynard v. Hill, *supra*, n. 14.

[65]Williams v. North Carolina, 317 U.S. 287 (1942).

[66]Stanley v. Illinois, *supra*, n. 38.

interest in the progeny, how can a husband be cut off from that interest merely because of his sex? It seems clear that a spouse must have rights to his legitimate progeny as did *Stanley* to his offspring.

A recognition that a spouse has rights in the marital relationship due him *qua* spouse carries with it a recognition that it is a legitimate function of the state to protect such interests. The interaction of rights, duties between the marriage partners has always been considered legitimate subject matter for the state.

> "When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not of contract. It was a contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law. They can neither be modified or changed by any agreement of parties. It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and none other. *Maynard v. Hill.*[67]

See also *Williams v. North Carolina*;[68] *Labine v. Vincent*[69] and *Wisconsin v. Yoder.*[70]

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[67]Maynard v. Hill, *supra*, n. 14 at p. 729.

[68]Williams v. North Carolina, *supra*, n. 65.

[69]Labine v. Vincent, *supra*, n. 61.

[70]Wisconsin v. Yoder, *supra*, n. 27.

If, as *Loving v. Virginia*[71] suggests, marital rights are fundamental, it seems clear that the state has a compelling interest in preserving those rights. Moreover the state is well within its rights when it acts to further due process with respect to a protected fundamental right.

The rights which a spouse has in his marriage and in his progeny are certainly substantial enough to warrant constitutional protection under the Due Process clause. See *Goss v. Lopez,*[72] *Lynch v. Household Finance Corporation.*[73]

The statute under review promotes compelling rights of both the state and the spouse. If the state does not, in contemplation of the marital relationship, have sufficient interest to require the husband's consent to such a serious matter which will not only cut off the life of his progeny, but may as well affect the ability of the wife to bear children in the future, and her psychological well-being, then we fail to see how the state could have sufficient interest in the relationship to support government involvement in coupling and uncoupling. See *Boddie v. Connecticut.*[74]

> "Despite all the experiments and all the talk, marriage remains the vital cell of our society. Preoccupied though we are with the material aspects of our societal existence, with prices and jobs, shortages and energy, we dare not neglect the institution of marriage. The disintegration of the family may do more to harm a society than

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[71]Loving v. Virginia, *supra*, n. 18.

[72]Goss v. Lopez, *supra*, n. 46.

[73]Lynch v. Household Finance Corp., 405 U.S. 538 (1972).

[74]Boddie v. Connecticut, *supra*, n. 37.

running out of its favorite source of energy." (Amitai Etzioni, professor of sociology at Columbia University and Director of the Center for Policy Research, in the Washington Post, December 28, 1975.)

IV.

THE DOCTRINE OF POLITICAL DIVISIVENESS IS OFFENSIVE TO ASSOCIATIONAL FREEDOMS

The petitioner has unfortunately injected a church-state dimension into the already frightfully complicated litigation. The Catholic Church has been singled our for special chastisement.[75] The nature of the petitioners' challenge moves us to respond.

First, we should like to point out that coincidence of law with religious belief is not sufficient to invoke the Establishment Clause.[76] As Mr. Justice Stewart noted in his dissenting opinion in *Griswold v. Connecticut:*

> "U.S. Constitution, Amendment I. To be sure, the injunction contained in the Connecticut statute coincides with the doctrine of certain religious faiths. But if that were enough to invalidate a law under the provisions of the First Amendment relating to religion, then most criminal laws would be invalidated. See, e.g., The Ten Commandments. The Bible, Exodus 20:2-17 (King James)."[77]

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[75] For the record, we are not the only church group that has publicly opposed abortions.

[76] McGowan v. Maryland, 366 U.S. 420 (1961).

[77] Griswold v. Connecticut, *supra*, n. 13 at p. 529.

It is ludicrous to argue that a statute which coincides with pronouncements of the Catholic Church constitutes an impermissible establishment. The Catholic Church is on record in support of all types of legislation which, if petitioners were correct, would be struck down as violative of the Establishment Clause. Legislation including the Civil Rights Act of 1964, food stamp program, housing programs, have been endorsed by Catholic Church officials as embodying a basic social justice which our faith requires us to seek. If the standard is coincidence, then these other acts must fall. This amicus is gravely concerned with the petitioners' use of the theory of political divisiveness. We resent that theory and its sinister portent.

The Catholic Church is a community. Essentially, it is not brick and mortar, wood and stone, but people – people who come together to a common worship of God. People who are citizens of the United States and therefore entitled to the political rights of citizens. Among these rights is the Freedom of Association guaranteed by the First Amendment. This Court has in *NAACP v. Alabama, ex rel Patterson,*[78] and *NAACP v. Button*[79] recognized First Amendment Rights in those associations under the penumbra of that Amendment. Clearly, those cases support the associational freedom to engage in the general political life of the nation. Political divisiveness is really synonymous with the democratic process. We govern ourselves by taking sides

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[78] N.A.A.C.P. v. Alabama ex rel Patterson, 357 U.S. 449, (1958).

[79] N.A.A.C.P. v. Button, 371 U.S. 415 (1963).

on various issues. In parliamentary parlance, the word "division" is sometimes a synonym for "vote". One cannot fully exercise civil rights without being politically divisive. The object of the democratic process is, after all, to produce a consensus. Our society is constituted by a plethora of associations and interest groups. Our political system operates, when it does so at all, by virtue of the interplay between these various groups. Always there are divisions; labor v. management, enterprise v. environmentalists, merchants v. consumer advocates. Is it really impermissible for religious groups to exercise the same associational freedoms as other groups whose rights to do so have been upheld by this honorable Court? Are people to be silenced because they associate with a church? Is it impermissible to speak through that association? Why is it that protection of free speech collapses when the speakers have some religious affiliation?

This amicus must submit that the Establishment Clause was never intended as a bludgeon against those who associated with religious groups. Certainly, James Madison did not think so when he wrote his "politically divisive" Memorial and Remonstrance. Paradoxically, the whole movement for disestablishment of religion was characterized by attitudes and legislative action which under petitioners' theory would constitute religious divisiveness. The political divisiveness argument portends the denial of political rights for millions of American citizens.

The notion that certain people may not speak on opics of public interest is gaining acceptance as the petitioners' brief attests. A no less prestigious body than the U.S. Commission on Civil Rights has also suggested that it may be constitutionally impermissible

for certain people to be heard except on public issues.[80] A fearful spectre looms behind that position and this amicus respectfully asks this Court to publicly disavow the concept of "entanglement through divisiveness", as unworthy of a democratic society.

V.

CONCLUSION

This amicus respectfully urges, for the reasons set forth herein, that this Court affirm the judgment of the lower court in matters considered here.

Respectfully submitted,

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[80]U.S. Commission on Civil Rights, Constitutional Aspects of the Right to Limit Childbearing, April, 1975.

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